United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANTS

059

In the

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 21208

TAYLOR ROARK,
Appellant,

v.

JOHN L. LEWIS, JOSEPHINE ROCHE, and HENRY SCHMIDT,
Trustees of the United Mine Workers of America
Welfare and Retirement Fund of 1950,
Appellees.

No. 21209

JOE S. REES,
Appellant,

v.

JOHN L. LEWIS, JOSEPHINE ROCHE, and HENRY SCHMIDT,
Trustees of the United Mine Workers of America
Welfare and Retirement Fund of 1950,
Appellees.

No. 21210

THEO R. FULLER,
Appellant,

v.

JOHN L. LEWIS, JOSEPHINE ROCHE, and HENRY SCHMIDT,
Trustees of the United Mine Workers of America
Welfare and Retirement Fund of 1950,
Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JULIAN H. SINGMAN
ORLIN L. LIVDAHL, JR.

Landis, Cohen and Singman
1910 Sunderland Place, N.W.
Washington, D.C. 20036

Counsel for Appellants

Washington, D. C. THIEL PRESS 202 393-0826

STATEMENT OF QUESTIONS PRESENTED

1. May the Trustees of the UMW Welfare and Retirement Fund of 1950 (the Fund) deny a pension to a retired miner and former employee of coal operators contributing to the Fund on the basis of the Trustees' unpublished administrative interpretation of one of the Resolutions governing the payment of pensions, when that interpretation is contrary to the clear language of the published Resolution?

2. May the Trustees of the Fund deny a pension to a retired miner when he previously qualified for a pension but is ineligible under a new Resolution announced too recently to give him reasonable time to file an application under the old requirements?

3. May the Trustees of a trust fund established pursuant to provisions of § 302(c)(5) of the Labor-Management Relations Act, 1947, in establishing eligibility requirements pursuant to authority delegated to them by the union and management, impose an eligibility requirement which would be:

(a) Violative of the employees' rights guaranteed in § 7 of the National Labor Relations Act;

(b) Grossly discriminatory in its allocation of pensions among employees covered by the Fund; and

(c) Effective in compelling an individual to remain unemployed, rather than accepting lawful and gainful employment with an employer not approved by the Trustees?

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BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

Plaintiffs-Appellants each brought suit pursuant to the provisions of 11 D.C. Code § 521 (Supp. IV, 1965) against the Defendants-Appellees who are Trustees of the United

Mine Workers of America Welfare and Retirement Fund of 1950 (the Fund). The Fund is a District of Columbia Trust and the amount in controversy in each case exceeds $10,000. The separate suits of Appellants were consolidated by the District Court. On Cross Motions for Summary Judgment the District Court entered final judgment in favor of Defendants-Appellees. Plaintiffs-Appellants appeal pursuant to 28 U.S.C. § 1291 (1964).

STATEMENT OF THE CASE

This case arises on appeal from an Order, entered without opinion, by the United States District Court for the District of Columbia granting Summary Judgment to Defendants-Appellees[1] and denying Plaintiffs-Appellants' Cross Motion for Summary Judgment.

Each of the Appellants herein is a retired coal miner and former employee of a coal company contributing to the United Mine Workers of America Welfare and Retirement Fund of 1950 (the Fund). The Appellees are the Trustees of the Fund. Upon retirement, each Appellant applied for a pension from the Fund. In each case the application was denied on the ground that, although the applicant had previously been employed by one or more coal mines contributing to the Fund, the applicant's *last* employment immediately preceding his retirement from the coal industry was with a company that was not contributing to the Fund (JA 46-49).

The Fund was established under the National Bituminous Coal Wage Agreement of 1950 (1950 Agreement) pursuant to the provisions of § 302(c)(5) of the Labor Management Relations Act, 1947, 61 Stat. 157, 29 U.S.C. § 186(c)(5) (1964) (JA 32). It is the successor to an earlier fund established in 1947, which in turn succeeded a fund established on May 29, 1946. Each fund has assumed the liabilities and assets of its predecessor (JA 36). The 1950 Agreement was a labor-management contract entered into between the

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[1] Hereinafter referred to as the Trustees.

United Mine Workers of America (UMW) and various bituminous coal companies (Signatory operators). The Fund has continued to exist, in substantially the same form, under various amendments to the 1950 Agreement.

The Fund's benefits are distributed by the Trustees in accordance with various Trustee resolutions. These resolutions are established pursuant to the provision in the Trust Indenture in the 1950 Agreement that:

> "Subject to the stated purposes of this Fund, the trustees shall have full authority, *within the terms and provision of the 'Labor-Management Relations Act, 1947,' and other applicable law*, with respect to questions of coverage and eligibility, priorities among classes of benefits, amounts of benefits, methods of providing or arranging for provision for benefits, investment of trust funds, and all other related matters." [Emphasis added.] (JA 33)

Appellant Taylor Roark worked as a coal miner for thirty-nine years prior to his retirement (JA 37). Roark was employed by coal operators who made contributions to the Fund or its predecessors (i.e., Signatory operators after 1946) for eleven years. (JA 18). Thereafter he was employed for approximately two years, from January 1960, to December, 1961, as an employee of non-Signatory operators[2] (JA 18). His application for a pension was received by the Trustees on July 5, 1962, and was denied by them on November 9, 1962 (JA 18).

Appellant Joe Rees worked as a coal miner for forty-two years prior to his retirement (JA 40). Subsequent to May 28, 1946 he was an employee of Signatory operators for nine years (JA 20). Thereafter he was employed for approximately twenty-two months, August, 1956, to June, 1958, by non-Signatory operators (JA 20). His application

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[2]The term non-Signatory operators, as used herein, includes any employer in the coal industry who is not signatory to the 1950 Agreement, as amended. It includes both non-union companies and companies which have signed labor contracts other than the 1950 Agreement, as amended.

for a pension was received by the Trustees on June 26, 1946, and was denied by them on February 5, 1962 (JA 19-20).

Appellant Theo Fuller was employed as a coal miner for approximately twenty-nine years prior to his retirement (JA 43). Subsequent to May 28, 1946, he was employed by Signatory operators for fourteen years (JA 22). Thereafter he was employed for approximately twenty-three months, April, 1963, to February, 1965, by non-Signatory operators (JA 22). His application for a pension was received by the Trustees on February 11, 1965, and was denied by them on October 7, 1965 (JA 22).

Appellants Roark and Fuller were denied their pensions because of their failure to meet the alleged requirement that the applicant's *last* regular employment immediately preceding his retirement from the coal industry must have been with a Signatory operator, without regard to any other past employment by Signatory operators. The Trustees assert that the requirement was contained in the provisions of Resolution 56, as amended by Resolution 57, which reads as follows:

> "I. *ELIGIBILITY*
>
> "An applicant shall be eligible for a pension if he has:
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> * * *
>
> "C. Permanently retired from and ceased work in the Bituminous Coal Industry after May 28, 1946, following regular employment in a classified job, described in paragraph B, 1, hereof, as an employee of an operator signatory to the National Bituminous Coal Wage Agreement of 1950, as amended, . . ." (JA 26-28).

Resolution 56, as amended by Resolution 57, remained in effect until February 1, 1965. It was superseded on that date by Resolution 63, which had been adopted by the Trustees on January 4, 1965. (JA 28).

Appellant Fuller had reached retirement age and was otherwise qualified for his pension under the Appellants' interpretation of Resolution 56, as amended by Resolution

57, in June, 1963. Although he had prepared his pension application in August, 1963, (JA 42), he did not submit it until after the Trustees announced the new eligibility requirements contained in Resolution 63. Processing of Fuller's application was completed by his union local in February 5, 1965 (JA 44), by the district on February 9, 1965 (JA 44), and the application was received by the Trustees on February 11, 1965 (JA 22).

Fuller was denied his pension on the grounds that his *last* regular employer in the coal industry was a non-Signatory operator. The provisions of Resolution 63 cited by the Trustees as the basis for this denial are as follows:

> "I. *ELIGIBILITY*
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> * * *
>
> "B. An applicant who, prior to February 1, 1965, has permanently ceased work in the Bituminous Coal Industry, as an employee of [a signatory operator] shall be eligible for a pension if he has
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> * * *
>
> "3. Permanently ceased work in the Bituminous Coal Industry after May 28, 1946, following regular employment as an employee in a classified job for an employer signatory to the National Bituminous Coal Wage Agreement, . . ." (JA 29-30).

Each of the Appellants brought separate suits in the United States District Court, District of Columbia, alleging that the Trustees had wrongfully denied them his pension. The Appellants asked that they be declared eligible for their pensions, that the Trustees be directed to place them on the rolls of individuals eligible to receive pensions and thereafter to pay them their monthly pensions, and that they be paid the back monthly pension payments which they had been wrongfully denied. (JA 1-3, 6-8, 12-14).

The Appellee Trustees filed a Motion for Summary Judgment in each case on February 6, 1967, (JA 50-51). The cases were consolidated in the District Court by order of Court dated March 3, 1967, and the Appellants filed a Cross

Motion for Summary Judgment on March 14, 1967 (JA 60-62). The District Court held a hearing on May 19, 1967, and after oral argument granted the Appellees' Motion for Summary Judgment and denied Appellants' Cross Motion (JA 63-64). Plaintiffs appeal from this decision.

STATUTES INVOLVED

The pertinent statutory provisions involved are § 7 of the National Labor Relations Act, as amended [49 Stat. 452 (1935); 61 Stat. 140 (1947); 29 U.S.C. § 157 (1964)]:

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)."

and the Labor Management Relations Act, 1947, Section 302(c)(5) [61 Stat. 157 (1947) 73 Stat. 537, 29 U.S.C. § 186(c)(5) (1964)].

> "(c) The provisions of this section [prohibiting employer contributions to labor organizations or their representatives] shall not be applicable,
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> * * *
>
> "(5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for

medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities;"

STATEMENT OF POINTS

I. In a suit against the Trustees of the United Mine Workers of America Welfare and Retirement Fund of 1950 (the Fund) alleging that the Defendant Trustees wrongfully refused to grant the Plaintiffs' pensions to which they were entitled, the District Court erred in granting judgment in favor of the Defendant Trustees when on the agreed facts:

(a) Two of the Plaintiffs clearly met the express requirements for a pension as set forth in the plain words of the applicable Trustees' Resolution governing pension eligibility in effect at the time they applied, and

(b) The third plaintiff, while not meeting the express requirement in effect at the time his application was received by the Trustees, did meet the requirement in effect until eleven days prior to the date his application was received by the Fund, and was not given a reasonable opportunity to qualify for a pension under the old requirements before being denied his pension under the new requirements.

II. In granting Summary Judgment in favor of the Defendand Trustees, the District Court erred because, if the Trustees' interpretation of the Resolutions upon which denial of the Plaintiffs' pension applications were predicated is considered permissible, nevertheless the portion of the Resolutions construed as containing the requirement that an individual's *last* employment be with a Signatory mine would be unlawful in that:

(a) It violates Appellants' statutory "employee" rights under § 7 of the National Labor Relations Act;

(b) It violates the Trustees' duty, when acting under powers delegated to them by the union and employers, not to impose upon the beneficiaries of the Fund a provision which discriminates among potential beneficiaries of the Fund;

(c) It violates the Appellees' common law fiduciary duty as Trustees to deal fairly with the interest of all beneficiaries of the Fund; and

(d) It is otherwise capricious, arbitrary and unreasonable.

SUMMARY OF ARGUMENT

I

The Appellants, Rees and Roark, claim eligibility for their pensions on the grounds that they met each and every express requirement for pension eligibility in effect at the time they applied for their pensions.

The Trustees deny that Roark and Rees qualified for a pension because each of the Appellants was employed in the coal industry *last* by a non-Signatory operator, although the Trustees admit to the Appellants' having previously worked many years for Signatories. The Trustees assert that the language in Resolutions 56 and 57, which provides that to qualify for a pension an individual must have "permanently retired from or ceased work in the coal industry after May 28, 1946, following regular employment in a classified job, described in paragraph B, 1, hereof, as an employee of an operator signatory to the [1950 Agreement]" means that the individual's *last* employment must be with an operator signatory to the Agreement, irrespective of the length of prior signatory employment.

By their interpretation of the Resolutions the Trustees are, in effect, inserting the word "immediately" in front of the word "following." The subsequent Resolutions adopted by the Trustees show that there is no basis for reading the word "immediately" into the text quoted above. The Trustees have no power to impose upon the Appellants, as applicants for a pension, a requirement not expressly contained in their eligibility requirements, and accordingly have unlawfully denied the Appellants their pensions.

Appellant Fuller admits that at the time that his pension application was received by the Fund he did not meet the eligibility requirements set forth in Resolution 63, effective February 1, 1965. He met the eligibility requirements as interpreted by Appellants in effect at the time he reached retirement age, at the time he prepared his pension application, and until eleven days before his application was re-

ceived by the Trustees. The Trustees' new eligibility requirements, which for the first time formally announced the "last employment" prerequisite used by the Trustees to deny all of the Appellants their pensions, were adopted by the Trustees on January 4, 1965, to be effective on February 1, 1965. Appellant Fuller submitted his application for a pension almost immediately after the eligibility changes were announced. The application was received by the Trustees on February 11, 1965. Under the doctrine announced by this Court in *Kosty v. Lewis*, 115 U.S. App. D.C. 343, 319 F.2d 744 (1963), Fuller was entitled to have his application evaluated under the standards in effect prior to February 1, 1965, and under those requirements, properly interpreted, Fuller qualified for a pension.

II

Assuming that the Trustees' interpretation of the language of Resolutions 56 and 57 is an allowable exercise of their discretion to construe their own language, this provision, as interpreted by them and as explicitly stated in Resolution 63 (collectively the Resolution in dispute), is unlawful. Under the Trustees' interpretation of the Resolution in dispute, only a single period of regular employment (one year under Resolution 63) for a Signatory operator is required for pension eligibility, but this period (year) can count only if it is an individual's *last* year of employment in the coal industry. There is no correlation whatsoever between length of time worked for a Signatory operator and pension eligibility.

An individual loses his eligibility for a pension, not as a result of leaving the employment of a Signatory operator, but solely and only if a subsequent employer, if in the coal industry, is a non-Signatory company. Where an individual is otherwise qualified for a pension he is, by this requirement, effectively commanded to remain unemployed, as opposed to accepting employment with a non-Signatory company if no Signatory or non-coal industry employment is available.

Moreover, the Resolution in dispute cannot be justified as assuring that an individual actually "retires" from Signatory employment, since it allows him to work for any employer anywhere, or remain unemployed, and still draw his pension, so long as he does not work for a non-Signatory coal company.

On the basis of the effect described above, the last employment with a Signatory operator requirement, as imposed by the Trustees, is unlawful in four respects, and accordingly cannot be relied upon to deny the appellants their pensions.

First. By directly penalizing an individual for taking a job with a non-Signatory coal company the Regulation violates his Section 7 (N.L.R.A.) rights to engage in, or to refrain from engaging in, concerted activity and to choose his own bargaining representative. As the Trustees are not within the group of persons (employers, labor organizations, and their agents) who fall within the jurisdiction of the National Labor Relations Board, the question of the Trustees' violation of the Appellants' § 7 rights may properly be raised before a U.S. District Court and this Court, particularly in the context of these claims.

Second. By providing that the only effective period of employment of a potential beneficiary which counts toward pension eligibility is the last regular period of employment (under Resolution 63, one year), thereby depriving all employees working for contributing Signatory operators other than those in their last year of employment of any effective interest or right in the pension fund, the Trustees have violated their duty, when acting under powers of drafting pension eligibility requirements delegated to them by management and the labor union, not to discriminate in the allocation of benefits among the employees covered by the agreement establishing the Fund.

Third. The Trustees have violated their common law fiduciary duty to deal fairly with the interests of all of the potential beneficiaries of the Fund.

Fourth. By requiring, in effect, that a man choose unemployment to lawful employment with a non-union operator, the Trustees have imposed a requirement which is analogous to the infamous "yellow dog" contract of pre-Norris-LaGuardia Act days of American labor relations and is capricious, arbitrary and unreasonable.

ARGUMENT

I

On the Agreed Facts, Appellants Met the Express Requirements Set Forth in the Plain Words of the Applicable Trustees' Resolutions Governing Pension Eligibility.

The Fund is a trust established pursuant to § 302(c)(5) of the Labor-Management Relations Act, 1947, as amended, 61 Stat. 157 (1947), 73 Stat. 537 (1959), 29 U.S.C. § 186 (c)(5) (1964 ed.). In granting or denying a pension, the Trustees of this trust (Appellees herein) are bound by the eligibility requirements which they have established. *Danti v. Lewis*, 114 U.S. App. D.C. 105, 312 F.2d 345 (1962). When these Regulations are changed, the Trustees must give those who qualify under the old Regulations, but who do not meet the new ones, a reasonable opportunity to obtain their pensions under the old requirements. *Kosty v. Lewis*, 115 U.S. App. D.C. 343, 319 F.2d 744 (1963). In the present case, the Trustees, in denying the Appellants their pensions, have violated the principles set forth in both of these cases.

Appellants Taylor Roark and Joe Rees were both denied their pensions on the sole ground that their last regular employment in the coal industry was with an employer who, at the time of the employment, was not a Signatory operator (JA 46, 47). The Resolution which the Trustees asserted as the basis for denial of their pensions was Resolution 56, as amended by Resolution 57. (JA 18, 20) As amended, the Resolution reads:

"1. *ELIGIBILITY*

"An applicant shall be eligible for a pension if he has:

* * *

"C. Permanently retired from and ceased work in the Bituminous Coal Industry after May 28, 1946, following regular employment in a classified job, described in Paragraph B, 1, hereof, as an employee of an operator signatory to the National Bituminous Coal Wage Agreement of 1950, as Amended,. . ." (JA 26-28).

On the admitted facts, both Appellants Rees and Roark had "retired from and ceased work after May 28, 1946, following regular employment in a classified job," etc. The language of Resolution 57 quoted above clearly does not contain any requirement that an individual, to be eligible for his pension, must have been employed by a Signatory operator "immediately" prior to his retirement, or that his "last" employment must have been with a Signatory employer. Yet that is precisely the requirement which the Trustees, in denying Roark's and Rees's applications for a pension, have imposed. The Trustees are doing exactly what this Court in *Danti* said the Trustees could not do, i.e., impose on an applicant a pension requirement that did not exist in the published terms of the eligibility requirements and use it as a basis for denying the pension.

In *Danti* the Trustees refused to accept the documentary proof of Danti's employment in the coal industry for the required number of years, although the documents he submitted met the published requirements for establishing pension eligibility. The Court ordered that the pension be granted, stating, "The Trustees violated their own Resolution by rejecting[the evidence] as insufficient," 114 U.S. App. D.C. at 109, and, "The District Court should have found the Trustees' decision arbitrary and capricious because it was based upon Danti's failure to prove something he was

not required to prove by Resolution 10." 114 U.S. App. D.C. at 108. By requiring Appellants Rees and Roark to have been employed by a Signatory operator *immediately* prior to their retirement, when Resolution 57 did not so require, the Trustees have done to Roark and Rees exactly what the Court in *Danti* said they could not do.

That Resolution 57 did not impose any requirement that an individual's last employment be with a Signatory operator is clearly shown when it is compared with its successor, Resolution 63. Whereas the earlier Resolutions make no reference to "last" employment or employment at the time of retirement, the new Resolution does. For example, Paragraph I, A states:

> "A. An Applicant who subsequent to February 1, 1965, permanently *ceases work in the bituminous coal industry as an employee of an employer signatory to the National Bituminous Coal Wage Agreement of 1950, as amended,* shall be eligible for a pension if he has:
>
> * * *
>
> 3. Permanently ceased work in the coal industry *immediately* following regular employment for a period of at least one (1) full year as an employee in a classified job for employers signatory to the National Bituminous Coal Wage Agreement." [Emphasis added] (JA 29-30).

In Resolution 63 the Trustees have quite clearly said – in two places – that an individual's *last* regular employment must be with a Signatory operator. Sub-paragraph A3 is virtually identical with the provision in dispute of Resolution 57, except that the key word "immediately" is added. Likewise Paragraph A imposes a "ceases work . . . as an employee of [a signatory operator]" requirement, whereas there was no such opening paragraph in either Resolution 56 or 57.

Clearly when the Trustees deliberately intended to write a requirement that last employment be with a Signatory

operator, they could, and did so. But they cannot impose such a requirement on Messrs. Roark and Rees *ex post facto* when the Resolution under which they applied did not contain the requirement. *Danti v. Lewis, supra.*

Appellant Fuller applied for a pension at about the time Resolution 57 was superseded by Resolution 63. The application was received by the Trustees on February 11, eleven days after Resolution 63 went into effect and thirty-eight days after it was adopted by the Trustees. For several years Fuller had been fully eligible – under the express terms of Resolution 57 – to apply for a pension. Indeed, his pension application had originally been prepared in August, 1963 (JA 43). He had continued to work, however, rather than applying for pension benefits. Because of the imposition of the requirement in Resolution 63 that the applicant's last employment be with a Signatory mine, however, Fuller was denied his pension.[3]

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[3] In the Cross Motion for Summary Judgment filed by Plaintiffs-Appellants, Fuller claimed eligibility for a pension under the provision of Paragraph B of Section I of Resolution 63, applicable to individuals who had retired prior to February 1, 1965, but whose applications for a pension were received after that date. This was the provision cited by the Trustees as the basis for denying Fuller his pension (JA 53). The requirements of subparagraphs 1-3 of Paragraph B are substantially identical to the eligibility requirements of Resolution 56, as amended by Resolution 57 – including the omission in sub-paragraph 3 of the word "immediately" in the requirement for Signatory employment. In their reply to Appellants' Cross Motion for Summary Judgment, the Trustees correctly observed, however, that the introductory portion of Paragraph B, like Paragraph A, did expressly impose the requirement that the applicant "have ceased work in the bituminous coal industry as an employee of [a signatory employer]" (JA 29). At oral argument Appellants' counsel conceded the point and acknowledged that in making the argument that Fuller qualified under Resolution 63 in the Cross Motion for Summary Judgment, counsel had relied only on the part of Resolution 63 set forth in the Trustees' Statement of Material Facts (JA 53). Thereupon counsel raised before the District Court the *Kosty* argument asserted herein.

If Appellants' interpretation of Resolution 57 is correct, Fuller clearly qualified for a pension under the old Resolution effective up until February 1, 1965. This Court has previously held, in *Kosty v. Lewis*, 115 U.S. App. D.C. 343, 319 F.2d 744 (1963), that the Trustees cannot change the eligibility requirements for a pension so as to deprive an individual of a pension who was otherwise qualified, but who has continued to work past retirement age, without giving him due notice and opportunity to apply for his pension under the old requirements. In *Kosty* the application for a pension was received about five months after the change in eligibility requirements was announced. Here it was received only thirty-eight days later. Clearly, thirty-eight days is not an unreasonable period in which to make the decision finally to retire and to submit a pension application, particularly in view of the requirements on the pension application that it be reviewed and verified by the union's district and local offices prior to submission, which was done in this case (JA 44).

Paragraphs B and C of Section I of Resolution 63 (JA 29-30) appear to attempt to comply with the requirements of this Court as set forth in *Kosty*. The paragraphs expressly provide that they apply to individuals who either had ceased work in the coal industry prior to February 1, 1965, or had continued to work after they could have qualified for a pension. The eligibility requirements as set forth in sub-paragraphs 1-3 of Paragraph B are virtually identical to the requirements in effect under resolutions 56 and 57. Sub-paragraph 3, the part corresponding to Paragraph C of Resolution 57 containing the Signatory employment requirement, does not contain the word "immediately" as does the equivalent sub-paragraph 3 of Paragraph A generally applicable to individuals qualifying for a pension after February 1, 1965. Paragraph B does, however, impose the equivalent to the requirement of Signatory employment immediately prior to retirement in the first part of the paragraph by stating that the applicant may qualify under the provisions only if he had "permanently ceased work in the bitu-

minous coal industry as an employee of [a signatory employer]." A similar requirement appears in Paragraph C. There was, however, no such requirement in Resolution 57 (JA 28). Accordingly, the principles of *Kosty* have not been met by the Trustees, and they cannot use Resolution 63 to deny Fuller his pension.

II

The Requirement That Only an Individual's Last Employment Be With a Signatory Operator as Imposed by the Trustees in Their Resolutions Is Unlawful.

Under the Trustees', and presumably the District Court's,[4] interpretation of the disputed provisions of Resolution 57, in order to qualify for a pension a miner's *last* period of regular employment in the coal mines must have been with a Signatory operator. This is the same requirement expressly contained in Resolution 63, except that "regular employment" is specifically defined as "one full year." The results of imposing such a requirement for pension eligibility are several and form the basis of Appellants' contention that this requirement is unlawful, if it be considered an acceptable interpretation of Resolutions 56 and 57 and if Resolution 63 is considered applicable to Appellant Fuller.

1. While the Resolutions specify that an individual must have worked at least twenty years in the coal industry to be eligible for a pension, the requirement that an individual's final year or period of regular employment must be with a Signatory operator is the *only* requirement of employment with a Signatory operator, and it is thus the only period of Signatory employment that counts toward pension eligibility. The result of such requirement is a most unfair and paradoxical situation. Individuals such as the

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[4]There being no opinion below, it is not possible to state with certainty what the reasoning of the District Court was in arriving at its decision.

Appellants may work most of their laboring lives[5] in mines contributing to the Fund, then work a short period of time before retirement with a non-Signatory employer and thereby lose all pension eligibility. Contrariwise, different individuals can work most of their lives for mines in no way contributing to the Fund, but then just prior to retirement go to work for a Signatory mine "regularly" (under Resolutions 56 and 57) or for "one year" (under Resolutions 63), and thus become eligible to retire with *full* pension benefits. The efforts of individuals like Appellants in performing the work which sustains the Fund would have been significantly greater than those of the late-comer employees who work for the Signatory mine only briefly just before retirement; yet the late-comer would enjoy all the fruits of Appellants' labor.

2. The Resolutions do not deny the employee of a Signatory his pension rights because he left the employment of a Signatory mine, but only if he later becomes employed by a non-Signatory coal operator. No benefits are lost because an individual quits, is fired, or laid off unless he commits the sin of working on non-Signatory coal. Thus, the last employment requirement cannot be justified on the usual grounds, common to most pension funds, of attempting to keep employees within the employ of the company and working in good faith.

3. Where an employee who loses his union Signatory mine job for any reason cannot find another job at a Signatory coal company, or with an employer outside the coal industry, he is commanded upon pain of loss of pension to remain unemployed, as opposed to accepting gainful employment with any non-Signatory employer. If the Appellants had remained unemployed after their last Signatory employment was terminated and had elected to remain on the pub-

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[5] Roark, Rees and Fuller worked respectively eleven, nine and fourteen years for Signatory mines contributing to the Fund or its predecessor funds (JA 18, 20, 22, 63). The earliest fund was created on May 29, 1946.

lic dole rather than working, then each would have qualified for his pension. The Regulation makes no distinction based upon whether or not there is any "authorized" work available or whether the only alternative is living off public welfare. It is the act of going to work for an unauthorized employer (non-Signatory coal mine) in and of itself that costs a retiring employee his pension.

On the basis of these results, the express requirement of last employment with a Signatory mine as set forth in Resolution 63, and the Trustee's interpretation of Resolution 57, which imposes the same requirement, are both unlawful.

A. *The Last Employment Requirement Violates the Appellants' Rights as Employees To Bargain Collectively Through Representatives of Their Own Choosing or To Refrain From Organized Labor Activities as Guaranteed Under § 7 of the National Labor Relations Act.*

Section 7 of the National Labor Relations Act provides, in part,

> "Employees shall have the right to self-organization, to form, join, or assist labor organizations, *to bargain collectively through representatives of their own choosing*, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, *and shall also have the right to refrain from any or all of such activities* except to the extent that such right may be effected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8(a)(3) [Union shop]." [Emphasis added] 49 Stat. 452 (1935), 61 Stat. 140 (1947), 29 U.S.C. § 157 (1964).

The requirement that the Appellants' last employment be with a Signatory mine, on its face and as applied to the Appellants in this case, directly penalizes the Appellants solely for the act of working for a coal industry employer who has not signed a contract with the United Mine Workers.

The penalty is the severest that the Fund can impose – loss of all pension rights. In financial terms it is the equivalent of a fine of approximately $20,000.[6] It applies if the employees of the subsequent employer are either unorganized, or represented by a union other than the UMW. The imposition of this penalty on the Appellants by the Trustees is a direct and flagrant violation of their Section 7 rights.

The National Labor Relations Board in interpreting the Act has established that an employee's Section 7 rights are violated when an employee is denied a benefit, or penalized because he works for an employer who is not a signator to a particular labor-management agreement. *Painter's District Council No. 19*, 137 N.L.R.B. 682 (1962). In that case the union operated an otherwise qualified hiring hall from which signatory contractors agreed to hire their employees. The union and the employers inserted in the contract a provision as follows:

> "Article III, Section 3.7(g). Anything to the contrary herein notwithstanding, any employee who has at any time registered at any union Hiring Hall and who thereafter:
>
> * * *
>
> "(3) works at the trade in an area not covered by this Agreement *for an Employer who is not signatory or who has not accepted and is not abiding by* a Collective Bargaining Agreement with a Trade Union covering said employment, shall thereafter be denied the use of the Hiring Hall for a period of one (1) year." [Emphasis added] 137 N.L.R.B. at 683.

In finding this contract provision a direct violation of an employee's Section 7 rights, the Board said:

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[6] An annuity of $100 per month (the usual pension) for life at age 60 is valued at $21,640 under the annuity evaluation tables of the Treasury's Internal Revenue Regulations, Sec. 1.79-9. At $75 per month for life (the lowest monthly pension paid to date by the Trustees), the pension is valued at $16,380.

> "The critical issue . . . is whether Section 3.7(g)(3) unlawfully restrains and coerces employees in the exercise of their Section 7 rights to engage in or refrain from engaging in, union activities, by barring previously registered employees from the use of the hiring hall for a period of 1 year, if they work under nonunion conditions outside the area covered by the Respondents' agreements. To state the issue is to answer it. For, the penalty of relinquishment of the right by registered employees to have access to the hiring hall should they work under nonunion conditions outside the area inevitably serves as a restraint upon their right under the Act to engage or not to engage in union activities for the duration of the agreements." 137 N.L.R.B. at 684.

The Trustees' last employment requirement is almost identical in effect to the clause in the Painter's Union's contract. There the individual lost his right to use the hiring hall for one year as a result of his non-Signatory employment. Here, as a result of such non-Signatory employment, the Appellants are deprived of their rights to pensions. For the same reason set forth by the Board in *District 19*, the Court should find the Trustees' Regulation a violation of Section 7.

While it is true that under the Trustees' Regulation an individual could reinstate his pension rights even after working for a non-Signatory by again returning to the employment of a Signatory coal operator and working regularly (or a period of one year), nevertheless this does not negate the coercive effect of the requirement for a number of reasons. First, the employee may not be able to obtain subsequent regular employment in a Signatory mine. This is particularly true when the individual has left his job with the Signatory mine because of lack of work or, as in the case of each of the Appellants, because he is an elderly man living in a depressed area where any job sufficient to support his family is difficult enough to obtain. Second, coal mining is widely recognized as a highly dangerous occupation, and a disabling injury, either sudden or cumulative, could easily

preclude the possibility of the employee's ever returning to Signatory employment.

The magnitude of the discrimination imposed upon the Appellants here, and accordingly the violation of their Section 7 rights, is best shown by comparison with the recent decision of the Supreme Court in *N.L.R.B. v. Great Dane Trailers*, 388 U.S. 26, (1967). There the Court found a § 8(a)(1) unfair labor practice – employer violation of employee Section 7 rights – where the employer withheld two weeks' vacation pay to striking employees while paying it to non-striking employees, although the contract calling for the vacation pay had expired and the striking employees were not at work at the time the employer made the payment. The Court found the company's action *prima facie* discriminatory and coercive, with the effect of discouraging the lawful (under § 7) concerted activities of the union members, i.e., their economic strike. By comparison, the Appellants here have been deprived by the Trustees of a lifetime retirement pension, most of the income they and their families expected to receive for the remainder of the Appellants' lives, for exercising another § 7 right, working for a non-signatory employer.

The *Great Dane Trailer* and *District 19* cases involved unfair labor practices–violations of an employee's § 7 rights by the employer and/or labor organization. Section 8 and 10(b) of the National Labor Relations Act prescribe the Labor Board as the forum for redress of such conduct. In the instant case, however, redress for an unfair labor practice is not sought. Rather enforcement of a trust right is being sought. See *Meat Cutter's Union v. Jewel Tea Co.*, 381 U.S. 676, 685-686 (1965). In addition, the Trustees do not come within the Board's unfair labor practice jurisdiction, as the Trustees are neither employees, labor organizations, nor their agents.[7] Indeed, Appellants understand the

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[7] Under § 302(c)(5) of the Labor-Management Relations Act, 1947, the Fund is established as an entity separate and apart from the em-

Trustees of this Fund to deny vigorously that they are agents of either the employer or the union. See Brief for Appellees, filed in this Court in *Miniard v. Lewis*, No. 20820, pp. 17-19. Appellants herein do not challenge the Trustees' contention that they are not agents of either the employer or the union.

Irrespective of whether or not the National Labor Relations Act provides a remedy for violations of § 7 rights by Trustees of a welfare fund, it is most assuredly clear that the section states a national public policy against infringement of such rights. In carrying out their fiduciary duties under a Trust Agreement executed under the umbrella of Federal law and involving the compensation of employees benefited by the Fund, *Lewis v. Benedict Coal Co.*, 361 U.S. 459, 469 (1960), the Trustees can certainly not be permitted to violate rights protected for their beneficiaries under a companion Act of Congress. The Courts cannot ignore public policy in supervising the exercise of the Trustees' fiduciary duties.

B. *The Trustees' Interpretation of the Resolution in Dispute Violates Their Duty to Potential Beneficiaries in Establishing Pension Eligibility Requirements Not To Discriminate Among Classes of Beneficiaries.*

In establishing eligibility requirements for a pension, the Trustees of the Fund perform a duty that, by statute, is entrusted to management and labor in their collective bargaining. Section 302(c)(5)(B) of the Labor-Management Relations Act, 1947, specifically provides that, in order for the employer to be able to make contributions to the Fund, "the detailed basis on which such [benefit] payments

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ployer and the labor organization who together establish it. Consequently, the Fund would come under the jurisdiction of the Board only if it were found to be an agent of either the employees or the union, or both. The Trustees, however, by the nature of their office, are not normally agents. *Taylor v. Mayo, Admrx.*, 110 U.S. 330, 334 (1894). *The Milwaukee Bridge*, 43 F.2d 589 (S.D.N.Y., 1930). 1 Scott, *Trusts*, § 8 (2d ed., 1956).

are to be made is [to be] specified in a written agreement with the employer."

In writing eligibility requirements for a pension into an employer-employee collective bargaining agreement that establishes a pension fund, the union, in negotiating these requirements, is under its usual statutory duty to represent fairly the interests of all the employees for whom it is the bargaining representative. See *Vaca v. Sipes*, 386 U.S. 171 (1967); *Wallace Corp. v. Labor Board*, 323 U.S. 248, 255 (1944). Under this duty, "the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve *the interest of all members without hostility or discrimination toward any*, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct." *Vaca v. Sipes*, 386 U.S. at 177 [emphasis added]. Not only does a union owe this duty to its own members who are in the bargaining unit,[8] but management likewise may not lawfully acquiesce to the violation of this duty. *Wallace Corp. v. Labor Board, supra; Steele v. Louisville & N. R.R.*, 323 U.S. 192, 203-204 (1944).

In this case, however, the Signatory operators and UMW, in establishing the Fund, delegated to the Trustees the duty of establishing "the detailed basis on which such [pension] payments are to be made." This delegation has been expressly upheld by several District Courts, *e.g.*, *Ramsey v. UMWA Welfare and Retirement Fund*, 237 F.Supp. 909 (E.D. Tenn. 1965); *Van Horn v. Lewis*, 79 F. Supp. 541 (D.D.C. 1947).

Appellants do not question the lawfulness of the delegation. Appellants do insist, however, that in so delegating their duty the union cannot give the Trustees power to do

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[8]The Fund is established for the purpose of paying benefits to the employees of the contributing operators covered by the agreement between the operators and the UMW (JA 32). Thus the potential beneficiaries of the fund are the employees represented by the UMW.

that which it could not itself do; i.e., discriminate among its members in the allocation of benefits. This is particularly true since the Trustees, in establishing criteria for payment of pension benefits, were engaging in a function that was of special concern to Congress in enacting § 302(c)(5). See *Arroyo v. United States*, 359 U.S. 419, 426 (1959); *Lewis v. Seanor Coal Co.*, __F.2d__, 56 L.C. ¶ 12,131 (CCH) (3rd Cir. No. 16161, decided Aug. 16, 1967); H.R. Rep. No. 10, 80th Congress, 1st Sess., 1947. Indeed, both union and management recognized this by providing in the 1950 Agreement containing the Trust Indenture that the authority of the Trustees shall be subject to the "terms and provisions of the 'Labor-Management Relations Act, 1947,' and other applicable law." (JA 33).

Moreover, pension plans and the rights of employees thereunder are part of employee "wages and conditions of employment." *Inland Steel Co. v. N.L.R.B.*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949). The benefits paid through this Fund to the employees of the contributing operators are a form of compensation to the employees. *Lewis v. Benedict Coal Corp.*, 361 U.S. 459, 469 (1960). Thus, in establishing criteria for the eligibility of beneficiaries, the Trustees perform the same function as union and management perform in negotiating wages and conditions of employment and should be held to the same standards. Compare *Marsh v. Alabama*, 326 U.S. 501, 504-510 (1946).

In any event, if this Court should hold that the Trustees can lawfully discriminate among classes of beneficiaries in a manner that the union itself could not do, the very act of the union in delegating its authority would constitute a breach of the union's duty "to fairly represent all of the employees" of the bargaining unit. *Vaca v. Sipes*, 386 at 176. Compare *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 723-725 (1961).

The discrimination imposed by the Trustees' Resolution is clear. The union represents all of the classified employ-

ees of the contributing employers. As set forth in the Trust Indenture, all classified employees constitute the group of potential beneficiaries whom the Fund was intended to benefit (JA 32). While the contributions to the Fund are part of the employees' compensation, *Lewis v. Benedict Coal Corp., supra*, under the last employment requirement *only* those employees working for the contributing employers in the year immediately preceding retirement receive any interest in the pension portion of the Fund.[9] The man who works for a Signatory employer for one year – if it is his last year – would receive full retirement benefits, whereas other beneficiaries such as Appellants who work for contributing employers for most of their lives, but work for a non-Signatory during their last years before retirement, receive nothing.

Such discrimination is totally unrelated to any of the usual categories where union distinctions in the allocation of benefits is permitted, such as seniority, length of service, work skills or type of craft. *Steele v. Louisville & N. R.R.*, 323 U.S. at 203. It is not even related to a general requirement that the employee work for a Signatory employer, as opposed to non-Signatory employment. The miner can draw his pension with nineteen years of non-Signatory employment and only one year of Signatory employment, if that year is his final year of employment, whereas those such as Appellants here with twenty or more years of employment for Signatories (and at least nine years of employment with Signatories making contributions to the Fund after the Fund was established) are denied their pensions on the basis of a year of employment with non-Signatories. Furthermore, an employee who spends his last working years in the employ of a non-Signatory employer *outside the coal industry* is not disqualified, while those who go to work for non-Signatory coal producers do lose their benefits. As the

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[9] Under § 302(c)(5)(C) the pension fund must be established as a separate fund, and separate allocations of funds made to it.

provision is obviously discriminatory, and cannot be justified on any of the grounds where reasonable distinctions might be permitted, the Trustees' last employment requirement clearly violates the Trustees' duty – derived from the union and management, the source of their authority to write the eligibility requirements, – not to discriminate among the beneficiaries in writing the requirements.

C. *The Last Year's Employment Requirement Violates the Trustees' Common Law Fiduciary Duty to the Plaintiffs as Beneficiaries of the Fund.*

The Fund is a trust (JA 32). The Trustees have a common law obligation to administer the Fund for the sole and exclusive benefit of the beneficiaries, subject to the purposes for which the Trust was established. Restatement, Trusts, 2nd, § 182 (1956 ed.). This obligation exists aside from any duty of fair representation which the Trustees may have arising from their peculiar status within the Federal labor law framework discussed in Paragraph II B above.

The Trust Indenture provides that the purpose of the pension portion of the Welfare Fund is to pay pension or annuities to the employees of Signatory operators. While the Trustees are given discretion in establishing the eligibility requirements, this discretion is expressly limited by a requirement that the eligibility requirements must be consonant with the purposes of the Fund (JA 33).

From the Labor-Management Relations Act and its legislative history, from the Trust Indenture itself, from the special tax considerations which Congress has given pension and welfare funds in general, from the well-known history of the development of union-management pension trusts, and from common knowledge it is obvious that one of the most important reasons for such trusts is the encouragement of long and faithful service by employees to employers who contribute to the Funds. The Trustees' Regulation, by putting a minimum emphasis on length of service or total service for a Signatory employee, and a maximum emphasis on the requirement that a person's *last* working

year, and only his last working year, must be with a Signatory operator, not only does not fulfill the purposes of the Fund, but is entirely contrary to it.

Moreover, the last year's employment requirement is completely antithetical to the concept, endorsed by the Supreme Court in *Lewis v. Benedict Coal Corp., supra*, that the Signatory operators' contributions are in fact a form of compensation to employees. Individuals, such as the Appellants herein, who work long years mining and loading coal on which royalties are paid are completely denied any interest in the pension part of the Fund, whereas an individual with one short year's service could draw full benefits.

To date, to Appellants' knowledge, the Trustees have put forward no justification for the last employment requirement, other than the argument that § 302(c)(5) of the Labor-Management Relations Act, 1947, requires an individual to be an employee of a contributing operator at the time he retires in order for him to be eligible for a pension. This contention has been clearly rejected by two United States Courts of Appeal, *Blassie v. Kroger*, 345 F.2d 58 (8th Cir. 1965), and *Garvison v. Jensen*, 355 F.2d 487 (9th Cir. 1966). Moreover, assuming there were such a statutory requirement, the Trustees' Resolution does not accomplish this purpose, for, as noted above, the employees might be unemployed or employed by a non-contributing employer at the time of his retirement. Without any other justification, and with the Regulation in dispute on its face being clearly contrary to the purposes for which the Fund was established, and discriminatory among the individuals for whose benefit the Trustees hold the Fund in trust, the Regulation must be considered a breach of the Trustees' common law fiduciary duty to the beneficiaries to administer the Fund fairly, and for their sole and exclusive benefit.

D. *The Last Year's Employment Requirement Is Otherwise Arbitrary, Capricious and Unreasonable.*

As set forth above, pp. 17-19, the Trustees' requirement that an individual work his last year for a Signatory employer, without regard to the nature of any of his other classified employment in the coal industry, has several perverse effects:

1. Only one year of employment, his *last* year with a Signatory operator, counts for pension eligibility.

2. A would-be pensioner is not penalized for leaving the employment of a Signatory operator, but *solely* for working his last year with a non-Signatory.

3. A would-be pensioner must remain unemployed if, upon leaving Signatory employment, he can find no employment in the coal industry other than with a non-Signatory.

Appellants submit that each of these results is arbitrary, capricious and unreasonable in the administration of a trust fund which is supposedly to be administered for the *benefit* of the employees. Most particularly, however, the requirement that the individual remain unemployed, as opposed to going to work for a non-Signatory mine, is strongly suggestive of a unionized version of the management "Yellow Dog" contract, once so popular among employers and now outlawed by Congress in §§ 2 and 3 of the Norris-LaGuardia Act. 47 Stat. 70 (1932), 29 U.S.C. § 102-103 (1964). Whereas the Yellow Dog contract provided that a man lost his job for joining the union, the Fund's requirement conversely dictates that a man lose all accrued pension rights for going to work for a non-union mine, *or a mine represented by another union*. The alternative, in both cases, is unemployment. The reasoned policy expressed by Congress in enacting the Norris-LaGuardia Act clearly dictates a finding in this case that the Trustees' last employment requirement is arbitrary and unreasonable.

CONCLUSION

For the reasons set forth above Appellants respectfully request that this Court reverse the judgment of the District Court and direct that judgment be entered in favor of each of the Plaintiffs-Appellants on their respective complaints.

Respectfully submitted,

JULIAN H. SINGMAN
ORLIN L. LIVDAHL, JR.

Landis, Cohen and Singman
1910 Sunderland Place, N.W.
Washington, D.C. 20036

Counsel for Appellants

October 9, 1967

BRIEF FOR APPELLEES

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21208

TAYLOR ROARK, *Appellant,*

v.

JOHN L. LEWIS, JOSEPHINE ROCHE, and HENRY G. SCHMIDT, Trustees of the United Mine Workers of America Welfare and Retirement Fund of 1950, *Appellees.*

No. 21209

JOE S. REES, *Appellant,*

v.

JOHN L. LEWIS, JOSEPHINE ROCHE, and HENRY G. SCHMIDT, Trustees of the United Mine Workers of America Welfare and Retirement Fund of 1950, *Appellees.*

No. 21210

THEO R. FULLER, *Appellant,*

v.

JOHN L. LEWIS, JOSEPHINE ROCHE, and HENRY G. SCHMIDT, Trustees of the United Mine Workers of America Welfare and Retirement Fund of 1950, *Appellees.*

Appeals From the United States District Court for the District of Columbia

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WELLY K. HOPKINS
HAROLD H. BACON
JOSEPH T. MCFADDEN
907 Fifteenth Street, N.W.
Washington, D. C. 20005
Attorneys for Appellees

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

STATEMENT OF QUESTIONS PRESENTED

1. Did the District Court err in granting appellees' Motion for Summary Judgment and denying appellants' Cross-Motion for Summary Judgment, when, on the uncontested, stipulated facts, before the Trustees and District Court, appellants clearly failed to meet Trustees' eligibility requirements, and were denied Trust Fund pension benefits.

2. If trustees of a trust fund, established pursuant to, and in conformity with, the provisions of Section 302(c)(5), Labor Management Relations Act, 1947, act in compliance with the precise standards provided by Congress in Section 302(c)(5) in establishing eligibility requirements for pension benefits of the Trust Fund, are they obligated by the separate provisions of the Act dealing with a union's duty of fair representation of all employees, and employee rights protected by Section 7 of the Act.

If so required, did Trustees fail to fairly represent all employees or violate employee rights protected by Section 7, in denying pension benefits to appellants, based upon the admitted fact each appellant had ceased to be an employee of a contributing employer, when the specific requirements of Section 302(c)(5) limit trust fund payments solely to such employees.

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MISCELLANEOUS:

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Appeals From the United States District Court for the District of Columbia

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BRIEF FOR APPELLEES

COUNTERSTATEMENT OF THE CASE

There is no dispute as to the material facts or issues involved, as presented by both parties in the District Court, and which are reproduced in the Joint Appendix.

Appellee-Trustees therefore accept appellants' statement of the case, as correctly outlining the facts as contained in the Joint Appendix.

SUMMARY OF ARGUMENT

Appellants urge reversal of the District Court's judgment order granting Trustees' Motion for Summary Judgment and denying their Cross-Motion for Summary Judgment.

The facts in the District Court were stipulated and are not in dispute. Each appellant made application for pension benefits of the Fund, which were denied by Trustees. The sole basis of the denial was failure of appellants to meet the pension eligibility requirement that an applicant must have permanently terminated his employment in the bituminous coal industry "following regular employment" as an employee of a coal producer signatory to the National Bituminous Coal Wage Agreement of 1950, as amended. All other pension eligibility requirements were satisfied. While each appellant had been previously employed by signatory employers, for various reasons they ceased signatory employment and permanently terminated bituminous coal industry service following employment as an employee of a coal operator who was not signatory to the collective bargaining agreement. A signatory operator is obligated, by the Trust Indenture contained in the collective bargaining agreement, to pay to the Fund a royalty on coal produced, which is the sole source of financing for payment of Fund pensions and other Fund benefits.

While appellants urge Trustees, in denying appellants pensions, violated the plain language of requirements of the eligibility Resolutions, the admitted and stipulated facts show conclusively appellants simply failed to meet the requirement of permanently terminating coal industry service "following regular employment" for signatory, contributing, operators.

Appellants also contend that the Trustees of the Fund, admittedly authorized by the Trust Instrument to establish regulations for determining the eligibility for Fund benefits, are bound by the restrictions and limitations placed on both unions and employers by other sections of the Labor Management Relations Act, 1947, and not incorporated by Congress in Section 302(c)(5). This contention is based on the erroneous assumption that because Trustees' authority is delegated by the union and employers involved, through the Trust Indenture, Trustees are impressed with the obligations imposed by the Act: (1) on a union to fairly represent the rights of all employees, and (2) upon a union and employer, jointly, not to violate the rights guaranteed employees by Section 7 of the Act.

Congress in placing limitations on trust funds created under the Act, and the trustees thereof, did not impress upon Trustees the unfair labor practice limitations it had placed upon unions and employers. Congress did not do so, though it had the opportunity in enacting Section 302(c)(5) and the subsequent amendments of that Section.

Trustees urge that the eligibility requirements here in question, permanent termination of industry service "following regular employment" for a signatory operator, are not only reasonable, but comply specifically with the mandate of Congress which authorized creation of such trust funds by 302(c)(5). The reason, reasonableness, and statutory compliance by Trustees find judicial support among numerous federal courts interpreting the action of these Trustees as well as the provisions of Section 302(c)(5). These decisions, as does the precise language of the Act, limit payment of 302(c)(5) trusts for the sole and exclusive benefit of employees of contributing employers. In addition, decisional authority interprets employees under Section 302(c)(5) to be current or present employees of signatory employers, and not those, like appellants, who cease to be so employed and take employment with non-signatory, non-contributing, employers.

Even if such union and employer unfair labor practice limitations are impressed upon Trustees, the Resolutions before this Court are not rendered unlawful. Clearly neither Trustees' Resolutions, nor Trustees' actions here, violate the unfair labor practice restrictions placed upon unions and employers by other sections of the Act. Appellants' thesis, that all employees must be treated equally in collective bargaining, has been consistently rejected by the Supreme Court, which recognized collective bargaining agreements may have adverse effects on some members because all members do not have the same interest or merit, necessarily subordinating some employee interests. The latitude afforded union and employer is subject only to honesty of purpose, without abuse of discretion.

It must be conceded that Trustees, in creating pension eligibility requirements, draw a line between eligibility and ineligibility, and some employees will inevitably be just on one side of the line or the other side. Some may never reach 60 years of age or acquire the necessary 20 years of service, or as here, permanently terminate industry service for a contributing operator, and therefore never receive pension benfits. The key is, not that some may never participate, but whether the line drawn between the eligible and the ineligible is consistent with honesty of purpose, not arbitrary or capricious. Here, Trustees have followed the requirement to pay benefits only to employees of contributing employers, initially prescribed by Congress, not the Trustees, union or employers. It is inconceivable that compliance with Congressional mandate could be said to lack honesty of purpose, but should it be deemed so, it is for Congress to remedy, not the courts.

ARGUMENT I

APPLYING THE FACTS IN EACH CASE TO THE LANGUAGE OF THE RESOLUTIONS INVOLVED, CONCLUSIVELY SHOWS NO DEVIATION BY TRUSTEES FROM RESOLUTION REQUIREMENTS IN THE DENIAL OF EACH APPELLANT'S PENSION APPLICATION.

Appellants, in an attempt to come within this Court's opinion in *Danti* v. *Lewis*, (C.A. D.C., 1962) 114 U.S. App. D. C. 105, 312 F. 2d 345, urge that each appellant was denied a Fund pension because the Trustees violated the plain language and requirements of their own eligibility requirements. (While appellant Fuller also urges the Trustees violated the notice doctrine of this Court's *Kosty* v. *Lewis*, (C.A. D.C., 1963) 115 U.S. App. D. C. 343, 319 F. 2d 744, this contention has been abandoned.[1])

The requirements of Resolution 57, paragraph I.C. (J.A. 28-29) and Resolution 63, paragraph I.B.3, (J.A. 30) are identical as involved here. If otherwise eligible, an applicant is eligible for a Fund pension, if he has:

> Resolution 57, paragraph I.C.
>
> C. Permanently retired from and ceased work in the Bituminous Coal Industry * * * following regular

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[1] Appellant Fuller's reliance on the notice doctrine of this Court's *Kosty*, both here and in the District Court, results from a misunderstanding of Trustees' position. In the District Court, both Trustees' motion for summary judgment and appellants' cross-motion for summary judgment, were based on a detailed stipulation of the facts upon which the appellants pension applications were denied. Fuller's raising of the *Kosty* argument in the District Court and in this Court resulted from the erroneous reference by the Trustees in their opposition to plaintiff's cross-motion for summary judgment, to the language in paragraph 1. B. of Resolution 63, rather than paragraph I. B. 3. The appellants and Trustees agreed in the District Court, and agree here, that the language of paragraph I. B. was not intended to impose any new eligibility requirement, and that the only eligibility requirement in Resolution 63, applicable to appellant Fuller here, is paragraph I. B. 3 (J.A. 30). On the basis of this understanding, Trustees are authorized to state here that appellant Fuller withdraws any contention that his pension application was denied because of lack of notice of Resolution 63's requirements.

> employment in a classified job, * * * as an employee of an operator signatory to the National Bituminous Coal Wage Agreement of 1950, as Amended, * * *.
>
> Resolution 63, paragraph I.B.3
>
> 3. Permanently ceased work in the bituminous coal industry * * * following regular employment as an employee in a classified job for an employer signatory to the National Bituminous Coal Wage Agreement, * * *.

Both eligibility requirements plainly provide that the applicant must have "Permanently" retired from or ceased work in the bituminous coal industry "following regular employment * * * as an employee of an operator signatory" to the collective bargaining agreement. Appellants simply do not meet this eligibility requirement.

Appellant Roark permanently terminated his coal industry service following regular employment for a non-signatory producer from November, 1960 until December, 1961, and knew the employer was not a signatory (J.A. 18).

Appellant Rees permanently terminated his coal industry service following regular employment for non-signatory producers from August, 1956 until June, 1958, and knew the employers were not signatories (J.A. 20).

Appellant Fuller permanently terminated his coal industry service following regular employment for a non-signatory producer from May, 1963 until March, 1965, and knew the employer was not a signatory (J.A. 22).

Appellants contend that Trustees have inserted the additional requirement that an applicant be "last" employed in the coal industry by a signatory employer and that he retire from or cease work in the industry "immediately" following such employment. The fallacy of appellants' argument is readily apparent.

First, each of the Resolutions require the applicant "Permanently" terminate his connection with the coal industry. The requirement that an applicant retire from or cease employment in the coal industry following employment as an employee of an operator signatory to the collective bargaining agreement has but one meaning, whether or not preceded by the word "immediately" or the requirement of "last" employment. The word "immediately" is an unnecessary, redundant, modification of the phrase "following regular employment".[2] Any subsequent non-signatory industry employment, immediately or later in time, patently violates the requirement of *permanent* termination of industry service as an employee of a signatory.

Second, the denial of pension in each case (J.A. 46-49) advised each appellant in detail that he had terminated service in the coal industry as an employee of a non-signatory employer. Each denial was consistent with the requirement of permanent termination of industry service as an employee of a signatory employer.

It is basic that if an applicant must permanently retire from or cease work in the coal industry following regular employment for a signatory employer, such employment must have been his last employment in the industry and he must have permanently terminated coal industry connections immediately following that employment.

The crux of appellants' argument is that they "had 'retired from and ceased work after May 28, 1946, following regular employment in a classified job,' etc." (Appellants' Br. p. 13), and on these admitted facts were entitled to a pension from the Fund. Appellants do not attempt to admit, nor can they, compliance with the other require-

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[2] Resolution 63, paragraph I. A. 3 (J.A. 29), not involved here, uses the phrase "*immediately* following regular employment", but the addition or deletion of the word "immediately" does not change the meaning or obvious intent of the requirement. (Emphasis supplied)

ments of the Resolution. Their quotation, out of context, fails to refer to the additional requirement that the applicant "*Permanently*" terminate industry employment "*as an employee of an operator signatory*" to the collective bargaining agreement.

Based upon the stipulated facts and appellants' argument admission, Trustees have followed to the letter the requirements of the Resolutions in denying each pension application.

ARGUMENT II

TRUSTEE PENSION ELIGIBILITY REQUIREMENTS REFLECT A REASONABLE EXERCISE OF THEIR FIDUCIARY OBLIGATIONS, FOLLOW THE SPECIFIC MANDATE OF SECTION 302(c)(5), AND DO NOT VIOLATE OTHER LABOR LEGISLATION, RESTRICTIVE OF UNION AND EMPLOYER.

Appellants first correctly observe that "Under the Trustees', and presumably the District Court's interpretation" (App. Br. p. 17) of Resolution 57, paragraph I. C., and Resolution 63, paragraph I.B. 3, an applicant must "Permanently" terminate coal industry service "following regular employment" for a signatory operator in order to qualify for a Fund pension. Appellants then argue the provision of the Resolutions here in question are unlawful.

As a preamble to their legal arguments purporting to prove the unlawfulness of the Resolutions, Appellants note some of the "results of imposing such a requirement for pension eligibility" (App. Br. pp. 17-19). Equally cogent here is the reasonableness of this requirement.

The United Mine Workers of America Welfare and Retirement Funds, which include the 1950 Fund and the predecessor Funds, have been in existence since 1946, and only last year did the 20th anniversary occur. Obviously, a stringent requirement of lengthy service for a contributing operator in order to obtain pension benefits would have effectively denied pension benefits to the thousands of retired coal miners who have since 1946 been granted

pensions. Would appellants have had Trustees adopt the more restrictive requirement of a full 20 years employment for a contributing operator[3] as an eligibility requirement for pension benefits? If so, none of the appellants could have obtained eligibility, and none of the thousands who have benefited from the Fund's pension program over the past 20 years would have benefited.

The requirement of termination of industry service "following regular employment" for a signatory operator here questioned is less restrictive than the prior requirement, examined by a Senate Subcommittee investigating pension funds created by the Act.[4] There the requirement of signatory employment was "for a *year* preceding retirement", rather than merely "regular employment" status. The prior resolution was also involved in the issues before the court in *Szuch* v. *Lewis*, (D.C. D.C., 1960) 193 F. Supp. 831, 833. Neither the Senate Subcommittee nor the District Court commented adversely with respect to this requirement, and no corrective legislation has been enacted.

In *Kosty* v. *Lewis*, (C.A. D.C., 1963) 115 U.S. App. D.C. 343, 319 F. 2d 744, this Court said (pp. 748-749):

> We do not deny the authority of the Trustees to revise pension eligibility requirements in the light of their experience. Flexibility of this kind seems especially necessary for the operation of this Fund, tied as it is to the fluctuating fortunes of the coal industry.

Perhaps at some future time the Trustees will deem it feasible to increase the required years of service for contributing operators. However, that decision, absent ar-

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[3] Section 302(c)(5) of the Act, [29 U.S.C.A. § 186(c)(5)] pursuant to which the Trust was created, required that such Trust be created "for the sole and exclusive benefit of the employees" of employers contributing to the Fund.

[4] Welfare and Pension Plans Investigation, Final Report submitted to the Committee on Labor and Public Welfare by its Subcommittee on Welfare and Pension Funds pursuant to S. Res. 40, as extended by S. Res. 200 and S. Res. 232 (84th Congress).

bitrary and capricious conduct, should be left to the expertise of the Trustees.

Chief Judge Gourley in *Kough, Sichko and McIntosh* v. *Lewis*, (D.C. W.D. Pa., 1961) 195 F. Supp. 657, recognized and approved the reluctance of courts to interfere with the action of trustees in adopting regulations governing 302(c)(5) trust fund benefits, saying (p. 658):

> It is not the province of the court to whittle away the purport and tenor of a trust created by authority which stems from Act of Congress, 29 U.S.C.A. § 186 (c). *Where deviation might exist from regulations adopted by the Trustees, the remedy lies against the Trustees for violation of said trust, and where regulations are deemed unjust, the remedy must lie with Congress.* For the courts to interject themselves in the fragile and delicate operations of a trust which requires expertise knowledge of trustees who have been selected for their know-how and familiarity with the inner workings of a vast and complex pension program, would prove inimical to the best interests of the trust and the employees for whose benefit it was created. (Emphasis supplied)

Judge Bazelon dissenting in *Danti* v. *Lewis*, (C.A. D.C., 1962) 114 U.S. App. D. C. 105, 312 F. 2d 345, said with respect to Trustees' qualifications, reason, and wisdom in adopting eligibility requirements, "The Trustees are at least as well qualified as the courts to decide such questions", and expanded this conclusion, stating, footnote 8 (p. 352):

> *A reviewing court necessarily views such issues in a vacuum, whereas the Trustees consider them against a background of practical considerations and facts not available to the court.* • • • Our inability to weigh such considerations militates against substituting our own interpretation of eligibility requirements for that of the Trustees. (Emphasis supplied)

The fact a miner has been employed by a signatory-contributing coal operator for five or ten years is no guaran-

tee he will receive Fund pension benefits. Such employment alone is but one of the requirements. He must meet each and every requirement. The miner may fail to acquire a total of 20 years service, or he may never attain 60 years of age. Then, as here, the miner may not permanently terminate industry service "following regular employment" for a signatory operator. Realistically, it must be recognized that each instance of failure to meet the eligibility requirements may be caused by physical, financial, or industry circumstances, beyond the miner's control.

In *Lewis* v. *Benedict Coal Corporation,* (C.A. 6, 1958) 259 F. 2d 346, 355, reversed on other grounds, 361 U. S. 459, 4 L. ed. 2d 442, the court held that employees did not have a vested or present interest in the Trust. The court in *Szuch* v. *Lewis,* (D.C. D.C., 1960) 193 F. Supp. 831, recognized, following the *Benedict* conclusions, that all potential beneficiaries who worked for contributing employers would not necessarily benefit, stating (p. 833):

> *As in a charitable trust, this trust has a fund set up for the benefit of a specific group of beneficiaries—not all of whom will benefit.* The trustees in exercise of their discretion established requirements which raise the individual beneficiary from the unascertained group. The trustees may change these requirements and must interpret them. (Emphasis supplied)

A conclusion in *Moglia* v. *Geoghegan,* (D.C. S.D. N.Y., 1967) 267 F. Supp. 641, is equally applicable here. The court said (p. 648):

> *Making an exception of this case would frustrate the purpose of the statute, which is to benefit and promote the welfare of the employee.* For, to pay out from a common fund in which all employees have a common as well as a separable right to employees not covered by collective bargaining agreements equally with those so covered, would certainly undermine the strength of collective bargaining, with resultant prejudice to

> the employee. It would encourage employers not to enter into them, if they could procure for their employees, at will and whim, benefits similar to those so covered without obligating themselves to any of the other conditions. (Emphasis supplied)

The history of the last 20 years, particularly the successful operation of the extensive pension plan, affirms Trustees' judgment. Thus, Trustees' awareness of the practical considerations surrounding the Fund's administration forms the predicate for the establishment of the type of eligibility requirement attacked here.

A. Statutory Restrictions, Constituting Unfair Labor Practices, Are by Congressional Enactment Imposed Upon Unions and Employers, Not 302(c)(5) Trustees, and Cannot Form a Basis for Invalidating Trustee Actions.

Both here and below appellants have asserted that the eligibility requirement of permanent termination of industry service "following regular employment" by a signatory operator is a violation: (1) of employee rights, protected by Section 7, Labor Management Relations Act, 1947, [29 U.S.C.A. 157], and; (2) the duty of a union to fairly represent the interests of all employees, which renders the eligibility requirement here involved unlawful.

Appellants have here abandoned the contention, urged below, that an agency relationship exists between the union and/or the employer creating a 302(c)(5) trust, and the Trustees. They now recognize "Trustees do not come within the Board's unfair labor practice jurisdiction, as Trustees are neither employees, labor organizations, nor their agents" (App. Br. p. 22). However, they now maintain "the Trustees can certainly not be permitted to violate rights protected for their beneficiaries under a companion Act of Congress" (App. Br. p. 23). Trustees are unaware of, and appellants have not cited, any authority which permits the imposition of separate and dis-

tinct sections of an Act of Congress on other sections of the same or another Act.

The cases cited by appellants, *Painter's District Council No. 19,* (1962) 137 N.L.R.B. 69; *N.L.R.B.* v. *Great Dane Trailers* (1967) 18 L. ed 2d 1027, 388 U. S. 26; *Vaca* v. *Sipes,* (1967) 17 L. ed 2d 842, 386 U. S. 171; and *Steele* v. *Louisville & N. R.R.,* (1944) 89 L. ed 173, 323 U. S. 192, have no applicability or relevance here. Each of these cases involve an unfair labor practice charge, against a union or employer for violation of employees rights under Section 7, or against a union for breach of the union's duty of fair representation. It is admitted "Trustees do not come within the Board's unfair labor practice jurisdiction" (App. Br. p. 22), but appellants attempt to transpose the union's and employer's unfair labor practices as additional obligations of trustees of 302(c)(5) trusts.

This Court is asked to legislate, and write into the provisions which create and limit the authority of trustees of a 302(c)(5) trust, the employee rights protected by Section 7, and a union's duty of fair representation. Congress in enacting Section 302(c)(5) had an opportunity to impress these prohibitions upon the trustees, but did not do so initially, or in subsequent amendments. The only Congressional limitation applicable here is the requirement that a 302(c)(5) trust be "for the sole and exclusive benefit of the employees" of employers making contributions to the Trust.

In *United Marine Division* v. *Essex Transportation Company,* (C.A. 3, 1954) 216 F. 2d 410, the Third Circuit in a landmark opinion, examining the legislative history of 302(c)(5), found the trustees to be separate from, and not representatives of, the employees, employer or the union. The court held (p. 412):

> *These trustees were not, in our judgment, representatives of the employees.* They were trustees of a welfare fund. It is true that they were chosen half and

> half by the employers' association and this union. But we think that when set up as a board, as they were in this case, *these individuals are not acting as representatives of either union or employers.* (Emphasis supplied.)

The court then observed, as to the statutory obligations imposed by Congress on trustees by Section 302(c)(5) (p. 412):

> They are trustees of a fund and have fiduciary duties in connection therewith as do any other trustees. *The terms under which they act were carefully spelled out.* (Emphasis supplied)

Adoption of the doctrine or theory of interchange of statutory rights and obligations, suggested here by appellants, would create a morass of legislative and jurisdictional confusion. Neither the unions, employers, employees, trustees nor the courts, would know what rights and obligations were extended by Section 302(c)(5), until the entire spectrum of labor legislation was examined in concert. Appellants' contention is without legal or legislative precedent, and should be denied.

B. Conceding, Arguendo, Trustees' Resolution Can Violate Employee Rights and a Union's Duty of Fair Representation, Protected by Statute, No Such Violation Has Occurred or Can Be Supported Here.

The Trust Instrument instructs Trustees to establish regulations for determining eligibility for Fund benefits, and appellants admit that such authority "has been expressly upheld by several District Courts" (App. Br. p. 24), but appellants "insist • • • the union cannot give the Trustees power to do that which it could not itself do; i.e., discriminate among its members in the allocation of benefits" (App. Br. pp. 24-25), or violate employee rights protected by Section 7.

Appellants' contention must be denied on at least two grounds:

(1) The Trustees are separate and apart from the appointing union and employers, and are not bound by the limitations placed upon union or management by the Act, and;

(2) If, arguendo, the Trustees are so limited, employee rights, and the duty of fair representation, have not been violated.

(1) The legislative history, the language of Section 302(c)(5), and the interpretative decisions of the federal courts, clearly separate the duties and obligations of union and/or management involved from those of the trustees of a 302(c)(5) trust. Once properly created under the terms and limitations of 302(c)(5), as was the instant Trust, the trust res and the trustees are severed from any umbilical attachments, and as thus created, proceed under the sole directives and limitations of Congressional mandate, reflected by Section 302(c)(5). *United Marine Division* v. *Essex Transportation Company,* (C.A. 3, 1954) 216 F. 2d 410.

(2) Conceding, *arguendo,* Trustees are bound by the union's duty of fair representation of all employees in collective bargaining, particularly the duty not to discriminate against any individual employees, neither the facts, nor the cited case authority, support the claim Trustees violated that duty.

The principal cases relied upon by appellants to support their contention are *Steele* v. *Louisville and N. R.R.,* (1944) 89 L. ed. 173, 323 U.S. 192, and *Vaca* v. *Sipes,* (1967) 17 L. ed. 2d. 842, 386 U.S. 171. Both cases support the general premise that a labor union must not unfairly discriminate against member-employees.[5] However, in *Steele,* the Su-

[5] Each of the appellants were members of the U.M.W. during the questioned non-signatory employment. (J. A. pp. 2, 7, 13).

preme Court held the right of fair representation "does not mean that the statutory representative of a craft is barred from making contracts which may have unfavorable effects on some of the members of the craft represented", adding that all "members are not identical in their interest or merit" (p. 183), and in *Vaca*, that "The collective bargaining system * * * of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit" (p. 853).

The Supreme Court in *Ford Motor Co.* v. *Huffman*, (1953) 97 L. ed. 1048, 345 U.S. 330, recognized that in the collective bargaining process (p. 1058):

> Inevitably differences arise in the manner and degree to which the terms of any negotiated argeement affect individual employees and classes of employees. *The mere existence of such differences does not make them invalid.* The complete satisfaction of all who are represented is hardly to be expected. (Emphasis supplied)

And that (p. 1058):

> *A wide range of reasonableness must* be allowed a statutory bargaining representative in serving the unit it represents, *subject always to complete good faith and honesty of purpose in the exercise of its discretion.* (Emphasis supplied)

Trustee regulations do nothing more than draw a line between the eligible and the ineligible. Wherever it is necessary to draw a line between qualification and disqualification, regardless of the subject matter, some persons will inevitably be just on one or the other side of the line. In *Addison* v. *Holly Hill Fruit Products*, (1944) 88 L. ed. 1488, 322 U.S. 607, the Court said (p. 1493):

> What was said in another connection is relevant here. "Looked at by itself without regard to the necessity behind it the line or point seems arbitrary. It might as well or nearly as well be a little more to one side or the other. But when it is seen that a line or point there

> must be, and that there is no mathematical or logical way of fixing it precisely, the decision of the [Administrator] must be accepted unless we can say that it is very wide of any reasonable mark." Mr. Justice Holmes, dissenting, in Louisville Gas & E. Co. v. Coleman, 277 US 32, 41, 72 L. ed. 770 775, 48 S Ct 423.

The requirement an applicant permanently cease work in the coal industry "following regular employment" for a contributing operator, is not "very wide of any reasonable mark." To the contrary it follows the requirement of Section 302(c)(5), restricting payments to employees of contributing operators.

Section 302(c)(5) is couched in the present tense. The words "employees of such employer" can only mean that an applicant for benefits must have the status of employment with a signatory at the time of application. A miner not currently in the employ of a signatory could not be "an employee of such employer". This result is also required by the words "employees of other employers making similar payments". Therefore, Congress itself established the threshold requirement of eligibility for Trust Fund benefits.

The court in *Blassie* v. *Kroger Company*, (C.A. 8, 1965) 345 F. 2d 58, noted the accepted definition of employee as follows (pp. 68-69):

> An employee ordinarily is a person presently engaged in employment. He is "One employed by another; one who works for wages or salary in the service of an employer". Webster's New International Dictionary (2d Ed. 1960), p. 839. [Citations]

And interpreted Section 302(c)(5) as follows (p. 70):

> We do not regard our conclusion as at all violative of any call by Arroyo for literal construction of the statute. *All we do in this civil proceeding is to construe the term "employees" to mean covered current employees and persons who were covered current employees but are now retired.* This is not non-literal

> construction but one which, we think, comports with the ordinary and literal meaning of the term. (Emphasis supplied)

The question simplified is: When does a person cease to be an employee of a contributing operator? An individual who has ceased his employment for a signatory employer certainly has left the category of an employee of a contributing operator as required by the Act. In *Gambrell* v. *Lewis*, (Mun. C.A. D.C., 1961) 167 A. 2d 605, Trustees' denial of Fund benefits to a former employee of a signatory operator was upheld. The court, reviewing the facts, noted (p. 605):

> For several years appellant's husband worked in a mine operated by a company signatory to the National Bituminous Coal Wage Agreement of 1950, under which the Fund was created. In November 1953 the mine was closed for economic reasons. He found work with another mining company which was not a signatory to the Agreement and shortly thereafter, on November 25, 1953, was killed in a mine accident. The question is whether decedent's widow is entitled to benefits from the Fund which was admittedly established for employees of operators signatory to the Agreement.

And concluded (p. 606):

> We must hold that the act of qualifying as eligible is the essential factor creating a beneficiary's rights under the Agreement. And we see no escape from the conclusion that such factor was lacking here because the decedent met his death while employed by a mine operator who was not a signatory to the Agreement. *The fact that he enjoyed rights in the Fund at one time does not serve to perpetuate his eligibility or carry it over into a time when he was not actually qualified as an employee of a signatory operator.* (Emphasis supplied)

As in *Gambrell*, appellants, whether voluntarily or involuntarily, left the employment of a signatory operator, and "The fact [they] enjoyed rights in the Fund at one

time does not serve to perpetuate [their] eligibility or carry it over into a time when [they were] not actually qualified as * * * employee[s] of a signatory operator.

Neither *Steele* v. *Louisville,* supra, *Ford Motor Company* v. *Huffman,* supra, nor *Vaca* v. *Sipes,* supra, forbid differences in the rights and benefits flowing to employees from a collective bargaining agreement, so long as the provisions of the agreement are "based on differences relevant to the authorized purposes of the contract" (*Steele,* p. 183), "subject always to complete good faith and honesty of purpose in the exercise of its discretion" (*Huffman,* p. 1058). Here the relevant difference, employee status, has at least the same force as the "differences in seniority, the type of work performed, [and] the competence and skill with which it is performed", approved in *Steele,* (p. 183).

The "good faith and honesty of purpose" of Trustees is manifest by the requirements of Section 302(c)(5), by the language of the Trust Indenture, and by the reasons for and reasonableness of the eligibility requirement questioned here. If the union's duty of fair representation of all employees, without discrimination, can be impressed on 302(c)(5) trustees, clearly that duty has not been violated by appellee-Trustees.

Appellants' contend the eligibility requirement of permanent termination of industry service "following regular employment" for a signatory employer violates an employee's "right of self-organization" and the "right to refrain from any or all such activities", guaranteed by Section 7.

Appellants rely on *Painter's District Council No. 19,* (1962) 137 N.L.R.B. 69, and *N.L.R.B.* v. *Great Dane Trailers,* (1967) 18 L. ed. 2d 1027, 388 U. S. 26. *Painter's* holds a union committed an unfair labor practice by withholding hiring hall privileges from members who accepted non-union employment. In *Great Dane Trailers*

an employer was held to have committed an unfair labor practice for withholding vacation pay from striking and paying non-striking employees. However, neither case supports appellants' contention Trustees eligibility requirement violates employee rights.

The Supreme Court's conclusion in *Great Dane Trailers* is conclusive here. The Court held (p. 1035):

> Since discriminatory conduct carrying a potential for adverse effect upon employee rights was proved and no evidence of a proper motivation appeared in the record, the Board's conclusions were supported by substantial evidence, *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474, 95 L. ed. 456, 71 S. Ct. 456 (1951), and should have been sustained.

There, "no evidence of a proper motivation appeared in the record". Here, the record is plain and clear the Trustees' "motivation" was the precise requirements of Section 302(c)(5). The Eight Circuit's *Blassie* v. *Kroger*, supra, and the Sixth Circuit's *Lewis* v. *Benedict Coal Corp.*, supra, support Trustees' interpretation of 302(c)(5), that employee means a "current" or "present" employee, and not one who is employed by other than a contributing operator.

Congress has been cognizant through its Senate Subcommittee investigating welfare funds,[6] at least since 1956, of the Fund requirement for pension eligibility that the applicant must have retired "following regular employment" by "an operator signatory" to the collective bargaining agreement. Had Congress felt the provision violated its own action in enacting Section 7, they could have enacted legislation restricting Trustees in this regard. Congress did not do so. The court's opinion in *Kough*,

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[6] Welfare and Pension Plans Investigation, Final Report submitted to the Committee on Labor and Public Welfare by its Subcommittee on Welfare and Pension Funds pursuant to S. Res. 40, as extended by S. Res. 200 and S. Res. 232 (84th Congress).

Sichko and McIntosh v. *Lewis,* (D.C. W.D. Pa., 1961) 195 F. Supp. 657, cogently and succinctly sets forth Trustees' position here, when it said (p. 658):

> Where deviation might exist from regulations adopted by the Trustees, the remedy lies against the Trustees for violation of said trust, and where regulations are deemed unjust, the remedy must lie with Congress.

It is obvious the "regulations" here involved were not "deemed unjust" by Congress.

Permanent termination of industry service "following regular employment" for a signatory operator is not a bar to the right of an employee to self-organization or to refrain from such activities. The Resolution requires only employment by a contributory employer who along with "other employers making similar payments" created the Fund "for the sole and exclusive benefit of [other] employees", Section 302(c)(5). Neither the Trust Indenture (J.A. 31-36) nor the Resolutions here involved (J.A. 26-30) requires union membership as a prerequisite for obtaining pension benefits. In fact, each appellant was a union member during all of the period involved (Roark, J.A. 2; Rees, J.A. 7; and Fuller, J.A. 13).

Judge Keech in *Penello* v. *U.M.W.*, (D.C. D.C., 1950) 88 F. Supp. 935, 939, enjoined the U.M.W. from insisting in the collective bargaining negotiations leading up to the 1950 Contract that Trust Fund benefits be limited to union members and their dependents. Had the union been permitted to restrict Fund benefits to union members, through the language of the Trust Indenture contained in the collective bargaining agreement, that action may have been construed as a violation of both Section 302(c)(5) and Section 7, but, the union was enjoined on insisting on this provision. The Trustees have not been required by the Trust Indenture, and have not by resolution, made union membership a prerequisite for eligibility for Fund benefits.

Concluding, *arguendo*, even if Trustees are impressed with the union's duty of fair representation, and the employee rights guaranteed by Section 7, the facts and judicial authority here presented, conclusively reject any violation thereof by the Trustees or the Trust Resolutions.

C. Trustees' Pension Eligibility Requirements Are Not Arbitrary and Capricious and Do Not Violate Trustees' Common Law Fiduciary Duty.

In view of the detailed arguments contained herein, Trustees feel the issues raised by appellants' Argument II, subarguments C and D have been adequately answered and will therefore not be repeated. However, appellants' reference to *Blassie* v. *Kroger Company*, (C.A. 8, 1965) 345 F. 2d 58 (App. Br. p. 28) requires clarification.

Appellants cite the *Blassie* case to support their contention the requirement of permanent termination of industry service "following regular employment" for a signatory operator is invalid. The whole context and scope of *Blassie* is to permit retired or inactive employees, who ceased active employment for a contributing employer to come within the "employee" definition of Section 302(c)(5). Not by word or inference, as a matter of fact or law, does *Blassie* presume to bring an employee, who has not retired or who has not remained in an inactive status since his last employment, but who has subsequently obtained employment for a noncontributing or a nonparticipating employer, within the "employee" definition of 302(c)(5).

CONCLUSION

On the basis of the foregoing, and the record in the District Court, which is contained in its entirety in the Joint Appendix filed herein, permits no other conclusion but that the District Court's order granting Trustees'

Motion for Summary Judgment, and denying Appellants' Cross-Motion for Summary Judgment, should be affirmed.

Respectfully submitted,

WELLY K. HOPKINS
HAROLD H. BACON
JOSEPH T. MCFADDEN
907 Fifteenth Street, N.W.
Washington, D. C. 20005
Attorneys for Appellees

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REPLY BRIEF FOR APPELLANTS

In the

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 21208

TAYLOR ROARK,
Appellant,

v.

JOHN L. LEWIS, JOSEPHINE ROCHE, and HENRY SCHMIDT,
Trustees of the United Mine Workers of America
Welfare and Retirement Fund of 1950,
Appellees.

No. 21209

JOE S. REES,
Appellant,

v.

JOHN L. LEWIS, JOSEPHINE ROCHE, and HENRY SCHMIDT,
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Welfare and Retirement Fund of 1950,
Appellees.

No. 21210

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v.

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APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JULIAN H. SINGMAN
ORLIN L. LIVDAHL, JR.

Landis, Cohen and Singman
1910 Sunderland Place, N.W.
Washington, D.C. 20036

Counsel for Appellants

Washington, D. C. THIEL PRESS 202 393-0625

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JOSEPH T. MCFADDEN
907 Fifteenth Street, N.W.
Washington, D. C. 20005
Attorneys for Appellees

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Welfare and Retirement Fund of 1950,
Appellees.

No. 21210

THEO R. FULLER,
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v.

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APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JULIAN H. SINGMAN
ORLIN L. LIVDAHL, JR.

Landis, Cohen and Singman
1910 Sunderland Place, N.W.
Washington, D.C. 20036

Counsel for Appellants

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In the

UNITED STATES COURT OF APPEALS

For the District of Columbia Circuit

No. 21208

TAYLOR ROARK,
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REPLY BRIEF FOR APPELLANTS

I

INTRODUCTION

In Appellant's brief, a number of arguments were made to demonstrate that the ground upon which Appellants were denied pension benefits was arbitrary and unlawful. Appellee-Trustees countered with only two main arguments in their brief: first, that their discretion to establish eligibility requirements is unlimited; and, second (not consistently), that § 302(c)(5) of the Labor-Management Relations Act, 1947, requires their eligibility requirement under which Appellants were denied their pensions. This brief is limited to those two points.

I

Appellees' Discretion Cannot Supersede Their Obligation To Deal Fairly With All the Beneficiaries of the Trust Fund and To Comply With Federal Labor Policy.

The basic issue raised by the Appellees' brief is whether the Trustees of a union-management pension fund can deny pensions to those individuals otherwise eligible, by imposing a requirement – a year's employment with a signatory operator immediately prior to retirement – that is discriminatory and capricious when judged against the purposes of the Fund and which violates Federal Labor Policy.

The Appellees-Trustees[1] present only one rationale for adopting such a requirement – that it is required by § 302(c)(5) of the Labor-Management Relations Act, 1947. This justification is nonsense, as discussed later in this brief. Their threshold defense, however, to both the discriminatory effect of the eligibility requirement and its violation of the employees' § 7 (of the National Labor Relations Act) rights, however, is that, irrespective of whether it is required by law, they, as Trustees, have virtually unlimited discretion

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[1] Hereinafter, "the Trustees."

in drafting the terms of pension eligibility. Consequently, the Courts should not, indeed, cannot set aside *any* eligibility requirements they might choose to impose. They claim, in effect, to be able to pay pensions to any employees whom they choose, on such terms as they deem proper, and without regard to any of the established policies of the Congress of the United States except as may have been expressly stated in § 302(c)(5) of the Labor-Management Relations Act, 1947.

The Trustees' claim to unlimited discretion causes the issues in this case to transcend in importance the immediate interests of the Appellants, Roark, Rees and Fuller. As of July 1, 1965, there were 11,160 active welfare and/or pension plans being administered under joint employer-employee trusteeships similar to the Fund in this case.[2] If the Trustees of this Fund have the unlimited discretion claimed in their brief, then not only are the interests of the 100,000 or so individuals under the UMW plan at the mercy of this "Trustees' discretion," but so are the millions of beneficiaries of the other plans administered under authority of § 302(c)(5).

The Trustees have posited several grounds as the basis for their asserted independence. These grounds, however, do not support the claim.

First: The Trustees assert that once the Fund was established by union and management and the Trustees were granted power under the indenture to administer the Trust, the Trustees became independent of any limitations that Congress had imposed upon both union and management; i.e., whatever restrictions applied to the parents, did not devolve upon their creation. Consequently, in establishing eligibility requirements for pension benefits, the Trustees may disregard the policies behind these limitations on the

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[2] U.S. Dept. of Labor, Welfare and Pension Plan Statistics: Characteristics of 163,600 Plans Filed as of July 1, 1965, p. 11, Table 4.

powers of labor and management, including the concept of fair representation and the guarantee of employees' § 7 rights.

No authority cited by the Trustees supports this right to disregard National Labor Policy.[3] They merely assert that to require them to do so "would create a morass of legislative and jurisdictional confusion" (Brief for Appellees, p. 14). On the contrary, to permit labor unions and employers to escape their Congressionally-imposed obligations by the simple expedient of establishing a trusteed fund for the benefit of union members would make a mockery of U.S. labor policy.

The basic error in the Trustees' argument rests on their assumption that Congress has legislated in a vacuum; that when Congress imposed one type of regulation on labor-negotiated pension and welfare trusts, it thereby exempted it from all other regulation. To the contrary all § 302(c)(5) does is to exempt from criminal prosecution employers who contribute funds to union-sponsored welfare and pension funds *if* they are administered by a jointly-appointed Board of Trustees.[4] There is no suggestion either in the language of the section or in its legislative history that Congress meant to exempt

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[3] Appellees' brief does refer to *United Marine Division v. Essex Transportation Co.*, 216 F.2d 410 (3rd Cir. 1954), which held that the Trustees of a § 302(c)(5) trust were not "representatives of the employees" within the meaning of § 302(a), and consequently payment of contributions to them did not violate that section's prohibition of employer payment to "any representative" of his employees. But there is nothing in that opinion to support the proposition that the Trustees as creatures of a union-management agreement may disregard the established doctrines of Federal Labor Policy applicable to both labor and management.

[4] § 302 was a Senate floor amendment to the Labor-Management Relations Act, 1947. The amendment was debated on two days before its adoption. 93 Cong. Rec. 4677-4680, 4746-4753 (1947).

the Trustees of such funds from the requirements of basic Federal Labor Policy.[5]

Moreover, the Supreme Court has clearly indicated that the considerations of National Labor Policy do apply to welfare funds established under § 302(c)(5). In *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960) the Court specifically resorted to such policy to determine the rights and liabilities of the Trustees of the Fund *vis a vis* the interests of the employee beneficiaries, 361 U.S. at 470.

Second: The Trustees point to what they consider to be the failure of Congress to place any restriction on the Trustees' discretion in § 302(c)(5). This argument is circular, for it assumes the question in issue – did Congress intend to exempt the union-management appointed Trustees from adherence to Federal Labor Policy? If Congress did not, there was no need for specifying that labor policy once more. Moreover, with respect to the Trustees' discretion in drafting eligibility requirements, it is clear that Congress thought this would be done by the union and management, not by the Trustees at all.[6] If this had been done, there could be no question that the employees would have these safeguards. The approval by the Federal courts of the delegation by labor and management of this responsibility to the Trustees (the correctness of which Appellants do not contest,

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[5] Senators Ball and Taft, who were the principal speakers in the Senate in support of the amendment which became § 302, both specifically stated that the provisions of § 302(c)(5) were not intended to provide a separate scheme of Federal regulation for welfare funds, but were intended only to insure that the funds were administered separately from the union and contained, as a minimum, the safeguards specified therein. 93 Cong. Rec. 4747, 4752 (1947).

[6] In the Senate debate on § 302, Senator Taft, for example, stated, "... that the amendment requires that there be specified in the agreement [establishing the fund] the exact terms under which benefits are to be received. The complete terms with respect to benefits must be set out in the agreement." 93 Cong. Rec. 4753 (1947).

Brief for Appellants, p. 24) is no reason to deny to the beneficiaries the protections that would clearly be theirs if the eligibility requirements were written by the parties that Congress thought would write them. It is even less reason upon which to base a conclusion that Congress deliberately intended to withhold these protections from the beneficiaries.

Third: The Trustees plead the problems of administering a fund and the needs for flexibility in that administration as requiring the broadest kind of discretion, citing, among other authorities, the dissenting opinion of Judge Bazelon in *Danti v. Lewis*, 312 F.2d 345, 351, 114 U.S. App. D.C. 105, 111 (1962). Sheer size and the need for flexibility of administration can hardly justify total abdication of normal trust administration obligations, to say nothing of Federal Labor Policy. Indeed, logically, the larger the trust, the more important it is that courts see to it that it is administered with rigid adherence to the usual fiduciary standards. As more persons come under the trust, the likelihood that the interests of some will be slighted or ignored under the guise of administrative expediency grows. Consequently, there should be a greater obligation upon trustees to prevent such injustice.

Fourth: The Trustees argue that their trust is akin to that of a charitable trust, citing the 6th Circuit's opinion in *Lewis v. Benedict Coal Corp.*, 259 F.2d 346 (1958), and the opinion of Judge Tamm (now Circuit Judge of this Court) in *Szuch v. Lewis*, 193 F.Supp. 831 (D.D.C. 1960). But the 6th Circuit was reversed by, and Judge Tamm did not cite, the Supreme Court's opinion in *Benedict*, 361 U.S. 459 (1960). In *Benedict*, the Supreme Court held that the employer's contributions under § 302(c)(5) were in the nature of *wages*, *not* a charity or gift. 361 U.S. at 469.[7]

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[7]Nor has Congress considered pension funds to be charities. For tax purposes it has treated employer contributions as a matter of employee compensation. I.R.C. §§ 401-404.

Fifth: The logical extension of the Trustees' reliance upon untrammeled discretion produces such preposterous and obviously indefensible results as to require rejection of the notion. If the Trustees are free from the requirements of any Federal policy and have absolute discretion with respect to eligibility for pensions, could they require that, to receive a pension, an applicant for a pension certify that he is white? or that he is Protestant? or that he has never voted against the UMW in a NLRB-sponsored election? or that he has never worked for a non-signatory mine?

II

The Last Year's Signatory Employment Requirement Is in No Way Required by Section 302(c)(5).

The Trustees further justify their imposition of the last year's signatory employment requirement on the ground that the provision is "required" by § 302(c)(5). (Brief for Appellees, pp. 17-19, 20.) Their argument is based upon the language in § 302(c)(5) that the employer's contributions to the Fund must be "for the sole and exclusive benefit of the employees of such [contributing] employer." This language, the Trustees say, requires exclusion from pension eligibility of any former employee of signatory operators unless the employee's last coal industry employment was with a signatory operator.

In support of this argument the Trustees state, "A miner not currently in the employ of a signatory could not be an 'employee of an employer.'" While this, of course, is true, it is irrelevant. In the case of the *former* employee of a signatory operator, the test is whether he was an "employee of an employer" at the time contributions were made on his behalf. Section 302 of the statute is a limitation upon *contributions* of the employer, not upon how the benefits from those contributions are to be parceled out to beneficiaries of the funds. Thus, the purpose of the language is to ensure that when contributions are made

by the employer, these funds are intended "for the sole and exclusive benefit" of *his* employees. This having been done, however, it does not necessarily follow, by any means, that by leaving such employment the employee will lose eligibility for benefits from those funds already contributed in his behalf.

Apparently ignoring this logic, the Trustees assert that the language of the statute must be interpreted to require that an individual have been an employee of a contributory operator at the time he retired (Appellees' Brief, p. 18). This interpretation is said to justify, indeed demand, the eligibility requirement upon which Appellants' pensions were denied.

Section 302(c)(5) imposes no such requirement; there is no reasonable basis for saying it does, and even if it did, the Trustees' Resolution does not do what the Trustees say the statute requires. Accordingly, § 302(c)(5) is not, and cannot be used as, a valid reason for justifying the Resolution.

A.

Neither the Statute, Nor Its Legislative History, Nor Past Congressional Policy Supports the Trustees' Interpretation.

The context of § 302(c)(5) and its legislative history reveal that Congressional concern was principally to insure that any employer contributions to a union welfare fund would accrue for the benefit of the workers who were represented by the union, rather than for the benefit of the union organization or officers. Indeed, the chief argument for the adoption of § 302 by its sponsors in the Senate was the need to protect the employees' interests in the fund.[8]

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[8] *E.g.*, Senator Ball, in introducing the amendment, stated, "The sole purpose of the amendment is not to prohibit welfare funds, but to make sure that they are legitimate trust funds, used actually for the specified benefits to the employees of the employers who contributed to them, and that they shall not degenerate into bribes." 93 Cong. Rec. 4678 (1947).

There is, however, nothing in the Senate debates on the adoption of § 302(c)(5) to support any inference that one group of retired former employees of the contributing employers were to be benefited over another. More particularly, with respect to the issues in this case, there is no indication of any intention by the Congress to deprive of their pensions persons such as Appellants who were ex-employees with many years of service with contributing employers while granting employees with little service their full pensions, which is the effect of the Trustees' eligibility requirement. Indeed, it was just such abuses of welfare funds which the sponsors sought to prevent.[9]

In addition, the specific language of the section in question has been used by Congress before and has not meant what the Trustees claim. The terminology, "exclusive benefit of the employees" used by the draftsmen of § 302 was used by Congress in 1939 in § 165 of the 1939 Internal Revenue Code to describe a requirement for tax exemption for pension funds.[10] Administratively, the Treasury as early as 1941 stated with respect to Section 165 that "[a] plan

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[9] Section 302 was added by the Senate. It was debated for two days, May 7 and 8, 1947. The debates are found in 93 Cong. Rec. 4677-4680 and 4746-4753 (1947).

[10] Section 165 of the 1939 Code, as enacted, states: "A trust forming part of a stock bonus, pension, or profit sharing plan of an employer *for the exclusive benefit of some or all of his employees*

> "(1) . . ., and
>
> "(2) if under the trust instrument it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees under the trust, for any part of the corpus or income to be (within the taxable year or thereafter) used for, *or diverted to, purposes other than the exclusive benefit of his employees,*

shall not be taxable under Section 161," [Emphasis added.] (53 Stat. 67).

is for the exclusive benefit of employees or their beneficiaries even though it may cover former employees as well as present employees. . . ." Regs. 111, § 29.165-1.

The Treasury's interpretation received the further sanction of Congress when the same language was carried forward in the 1954 Internal Revenue Code. See *Jackson Finance & Thrift Co. v. Comm.*, 260 F.2d 578, 581 (10th Cir. 1958). To date the Treasury's regulations continue to state, in virtually the same language as in the regulations adopted in 1941, that for tax exemption a plan "is for the exclusive benefit of employees or their beneficiaries even though it may cover former employees." Regs. § 1.401-1(b)(4). Thus, in the tax field, the language of § 302(c)(5) has long been interpreted in a manner quite inconsistent with the interpretation that forms the foundation of the Trustees' entire case.

The Trustees imply that their interpretation of § 302(c)(5), which led to the requirement of the last year's signatory employment, received the implied approval of the Senate Special Subcommittee on Welfare and Pension Funds (Brief for Appellees, p. 20). Such claim is totally unjustified and unsupportable. While the language, "retire following regular employment for a signatory operator," which the Trustees claim to impose this eligibility requirement, was in the Trustees' eligibility Resolution in effect at the time of the Subcommittee's pension study, no explanation of the language appears in the Committee Report. More importantly, however, the Committee's major concern on eligibility requirements was in reviewing the grounds upon which pensions had actually been denied. The requirement for a year's employment with a signatory operator as an individual's last employment *was not* included among the list of grounds for the denial of pensions which the Committee stated it studied and evaluated.[11] As the Subcommittee did not review the ef-

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[11] Welfare and Pension Plan Investigation, Final Reports Submitted to the Committee on Labor and Public Welfare by its Subcommittee on Welfare and Pension Funds pursuant to S. Res. 40, as extended, S. Res. 200, S. Res. 232 (84th Cong.), p. 176.

fects of the one year's last employment requirement, nor even was demonstrably aware of its existence, it certainly cannot be said to have given any implied approval to it.

Not only is there no statutory support for the Trustees' interpretation of § 302(c)(5), but their interpretation would defeat the Congressional policy against "forfeitures" of employees' interests in pension trusts expressed in I.R.C. § 401(a)(8). Moreover, I.R.C. § 401(d) specifically *requires* "vesting" of employees' interests in funds where certain types of employee-employer relationships exist. If a trust cannot pay benefits to an employee after he has left the employment of the contributing operator, *prima facie* there could be no vesting of pension or retirement rights. The Trustees' brief thus in effect argues that Congress intended in § 302(c)(5) to prohibit on the one hand what it encourages or requires on the other.

Not only Congress, but also the Courts strongly oppose forfeitures of employee benefits. As stated by the New Jersey Supreme Court in a recent profit-sharing plan case:

> "It must be remembered that we are not dealing with a mere gratuity, to be bestowed upon such objects of the donor's bounty as the donor or his trustee may select. On the contrary, the trust indenture represents a hard-headed business device to attract and to hold employees. As the indenture itself says, the purpose is to 'compensate and reward * * * for loyal and faithful service.' Favorable tax treatment is accorded upon the premise that the profit-sharing plan involves compensation. The Federal Tax Regulations speak of the sum payable as 'deferred compensation.' Treas. Reg. § 1.401-1(b)(ii) (1967). When the employee renders service in response to the promise of the trust plan, he acquires a right no less contractual than if the plan were expressly bargained for. [Citations omitted.] The question, then, is whether the employee should suffer a forfeiture of something he has earned. Forfeiture being disfavored we should take any tenable view of

the indenture to avoid it. Indeed, these plans are to be liberally construed in favor of the employee. [Citations omitted.]" *Russell v. Princeton Laboratories*, 50 N.J. 30, 231 A.2d 800, 803 (1967), (Weinstein, C.J.).

B.

The Cases Upon Which the Trustees Rely Do Not Support the Trustees' Interpretation of § 302(c)(5).

The Trustees rely upon three cases to support their interpretation of § 302(c)(5). None of these cases supports the Trustees' argument

The Trustees first cite *Blassie v. Kroger*, 345 F.2d 58 (8th Cir. 1965). The issue in *Blassie* relevant to this case was whether a welfare fund could pay hospitalization benefits to retired former employees of contributing employers. The Eighth Circuit approved such payments, saying that § 302(c)(5) required only that an individual be either an employee of a contributing employer or be retired and have been an employee of an employer who was, during the period of the individual's employment, contributing to the fund. The Appellants in this case, who were "covered current employeees," for at least nine years each, and who are now retired, quite obviously are included within the test laid down by the Court and thus should be eligible for benefits.

The Trustees also cite the Sixth Circuit's decision in *Lewis v. Benedict Coal Corp.*, 259 F.2d 346 (1958) (Brief for Appellees, p. 20). Appellants' counsel, after diligent reading of that decision, can find nothing in it which interprets § 302(c)(5) as the Trustees allege. In any event, the Supreme Court reversed that part of the Sixth Circuit's decision dealing with the Welfare and Retirement Fund. *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960).

Finally, the Trustees cite *Gambrell v. Lewis*, 167 A.2d 605 (Mun. Ct. of App., D.C., 1961), where that court affirmed the Trustees' denial of an application by a widow for a death benefit from the Fund. The claimant's husband had died in a coal mine accident while he was working for a non-signatory operator. The case is inapplicable to the issues herein primarily because there the Court was dealing with a death benefit arising out of an individual's employment, a type of welfare fund benefit which, by its nature, is directly connected with *current*, rather than past, employment.

Aside from the factual distinction, the court in *Gambrell* stated only that in the circumstances of that case, it would not find arbitrary and unlawful the withholding of benefits by the Trustees, 167 A.2d at 606. The court did not state that § 302(c)(5) in any way required that result, the proposition for which the Trustees cite the case.

C.

The Eligibility Requirement Upon Which the Appellants Were Denied Their Pensions Cannot Even Be Justified by the Trustees' Interpretation of § 302(c)(5) and Thus It is Without Any Reasonable Basis.

The test of discrimination under the fair representation requirement is whether or not the disctinctions drawn are reasonable. *E.g., Steele v. Louisville & N.R.R.*, 323 U.S. 192, 203 (1944). Reasonableness means, at the very least, that there be some reason behind what a man does, or the rule which he imposes. The only reason which the Trustees in their brief have suggested for their imposition of the requirement for the last employment to be with a signatory is that it is required by statute. But, as shown above, there is no basis for finding that § 302(c)(5) imposes the eligibility provision which the Trustees allege. Furthermore, even if the statute could be read as containing such a requirement, the Trustees' Resolution does not meet it.

The Trustees' argument for the eligibility requirement in dispute is that to be "an employee of such [contributing] employer" as required by § 302(c)(5), an individual *must* have been an employee of a contributing employer at the time of his pension application (Appellees' Brief, p. 18). Their eligibility requirement in Resolution 57 obviously does not comport with that reading of the statute. Clearly, under the "retired from and ceased work in the Bituminous Coal Industry . . . following regular employment in a classified job. . . as an employee of a [signatory] operator" language, a former employee of a contributing employer, who is working in a job *not* in the coal industry but whose last coal industry job was with a signatory, would be eligible; yet he assuredly would not be an "employee" at the time of his application. Likewise, an applicant who left a signatory employer and was unemployed for a period of years before applying for a pension would be eligible.

The facts in Appellant Roark's case are a good example of the effect of this requirement. Roark worked for the signatory Blue Diamond Coal Company from 1937 to 1957 (JA 38). When he left the Blue Diamond Coal Company, Roark could have remained unemployed for the five years which he needed to reach the retirement age, and he would still have qualified for a pension. Likewise, he could have worked for one, two, or even five years for the corner grocery store, or any other non-coal industry employment (if he could have gotten such a job in the economically depressed Appalachian area), and would still have been eligible for his pension. In either case, there would be no difference in the status of Roark as a "former employee" of Blue Diamond at the time he reached retirement age and his status as a "former employee" after working for a couple of years for another coal company before applying for his pension. Yet in the first two cases, under Resolution 57, he would be entitled to his pension, but in the latter case, which is what he did, his pension is denied. Yet under the Trustees' interpretation of § 302(c)(5), all three cases should be treated the same – pension denied – as

in none of the cases would Roark have been an "employee" of a signatory at the time his application was filed.

Thus, the one year's last employment requirement is clearly not a "good faith" attempt to comply with statutory requirement. It is a requirement without good reason, with admitted capricious effects, and which imposes a penalty to deny the Appellants their pensions for having worked when, in the eyes of the Trustees, they should have been on the dole.

If the legislative history of § 302(c)(5) shows anything, it shows a deep Congressional concern to preserve for the employees, whose labors finance funds such as this, the benefits which flow from them. For between nine and fourteen years the Appellants mined the coal upon which the 40 cent royalties which finance this Fund were paid. Now the Trustees seek to deny to the Appellants their pensions, while granting pensions to other employees who have worked for contributing employers for periods of a year or even less. The sole basis for denying the Appellants their pensions is that they worked when they could have been unemployed. Appellants respectfully submit that they are entitled to their pensions.

CONCLUSION

For the reasons set forth in this Reply Brief, as well as for the reasons set forth in their original brief, Appellants respectfully request that this Court reverse the Order of the District Court and direct that judgment be entered in favor of the Appellants awarding them their pensions and such other relief to which they may be entitled.

Respectfully submitted,

JULIAN H. SINGMAN
ORLIN L. LIVDAHL, JR.

Landis, Cohen and Singman
1910 Sunderland Place, N.W.
Washington, D.C. 20036

Counsel for Appellants

December 1, 1967

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21208

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PETITION OF APPELLEES FOR REHEARING

WELLY K. HOPKINS
HAROLD H. BACON
JOSEPH T. McFADDEN
907 Fifteenth Street, N. W.
Washington, D. C. 20005
Attorneys for Appellees

Of Counsel:
JOHN J. WILSON
FRANK H. STRICKLER
815 Fifteenth Street, N. W.
Washington, D. C. 20005

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PETITION OF APPELLEES FOR REHEARING

Appellees respectfully move the Court for rehearing in respect of Section II of the Opinion handed down on August 21, 1968. Appellees believe that Section II is predicated on the erroneous concept that persons who worked for a signatory employer for any period of time,

no matter when or for how long, acquired a vested interest in the Trust Fund. This basic misapprehension of the applicable law was accomplished by the Court without direct reference to, or discussion of, the vesting principle. Perhaps the Court was unaware that decision of the point was an inherent part of its remand order. In any event, the Court held that an eligibility requirement which has been followed and enforced for some twenty years is not authorized by the Act and is *prima facie* unreasonable and, therefore, invalid unless the appellees demonstrate, on the basis of *subjective* facts, the reasonableness of the requirement when viewed in light of the purposes of the Fund.

Appellees urge rehearing for the following reasons:

(1) Since neither appellants nor appellees raised the vesting issue, it was neither briefed nor argued by the parties, and this Court should grant rehearing in order to be advised in the premises.

(2) The holding of Section II that the eligibility requirement is *prima facie* unreasonable is erroneous, being based on a misconception of applicable fact and law.

ARGUMENT I

The Court's Opinion Erroneously Implies, if Not Specifically Holds, an Applicant Has Vested Rights to Fund Pension Benefits, Based on the Sole Prerequisite of Some Period of Contributory Employment, Though Not Required by Statute, and Denied by the Trust Indenture.

The Opinion of this Court is seemingly predicated on the erroneous premise that pension benefits, and other benefits of the Fund, can and do *vest in potential* beneficiaries. This Court stated that:

> "• • • it is nevertheless clear that the longer an applicant has worked for contributing employers, the more direct connection there is between his labor and the sums paid to the trustees on his behalf" (Op. 5),

and

> "The contributions which signatory operators made on their behalf did not evaporate as a result of their later employment with non-signatories" (Op. 6).

These statements indicate, if not specifically hold, that an employee's future Fund pension rights are vested by the mere fact of his employment by a contributing operator for some period of time *prior* to establishing his eligibility under the requirements adopted and established by the Trustees.

The vesting of benefits is *not* a requirement of Section 302(c)(5),[1] and *was with particularity denied* by the settlors themselves when creating the Fund, as evidenced by the Trust Indenture contained in the National Bituminous Coal Wage Agreement of 1950 (J.A. 33-34).[2]

Congress now has before it proposed legislation[3] to require some manner of vesting employee rights in 302 (c)(5) trusts. However, such proposals are prospective, not retroactive. The mere fact of the proposed legislation, on its face, precludes any contention or consideration of a past congressional requirement or intention that Section 302(c)(5) as originally enacted, provided or required the vesting of benefits.

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1 Labor Management Relations Act, 1947, 29 U.S.C.A. § 186(c)(5).

2 Title to all the moneys paid into and or due and owing said Fund shall be vested and remain exclusively in the Trustees of the Fund, and *it is the intention of the parties hereto* that said Fund shall constitute an irrevocable trust and that no benefits or moneys payable from this Fund shall be subject in any manner to anticipation, alienation, sale, transfer, assignment, pledge, encumbrance or charge, and any attempt so to anticipate, alienate, sell, transfer, assign, pledge, encumber or charge the same shall be void. The moneys to be paid into said Fund shall not constitute or be deemed wages due to the individual mine worker, nor shall said moneys in any manner be liable for or subject to the debts, contracts, liabilities or torts of the parties entitled to such money, i.e., the beneficiaries of said Trust under the terms of this Agreement. (Emphasis supplied.)

3 S. No. 1103, 90th Congress, 1st Session, 1967. S. No. 3421, 90th Congress, 2nd Session, 1968. H.R. No. 13544, 90th Congress, 1st Session, 1967. H.R. No. 15244, 90th Congress, 2nd Session, 1968. H.R. No. 17046, 90th Congress, 2nd Session, 1968.

The settlors of the Trust, various bituminous coal operators and the United Mine Workers of America, were cognizant of the benefit requirements adopted by the Trustees, pursuant to settlor authorization, as were the employees, the potential beneficiaries. The eligibility requirements, including retirement "following regular employment in a classified job, as an employee of an operator signatory", were published annually by the Trustees and given wide distribution in the bituminous coal industry (J.A. 25).

It is patently beyond question that under those published eligibility requirements, there was no vesting of pension benefits. An employee of a contributory operator could lose potential Fund benefits for numerous reasons. An employee could cease classified employment, i.e., become a foreman, a coal operator, do nonclassified work, or as here, could cease employment for a signatory, i.e., a contributing employer. Additionally, he could fail to complete the required twenty years' service for numerous personal reasons, i.e., death, health, layoff, desire for other employment, lack of employment opportunity with signatory operators, to name but a few of the multitude of personal variables involved. There is no claim by the appellants that the settlor operators or union protested this lack of vesting, or that the appellants protested, even though knowledge of the lack of vesting of pension benefits by reason of Trustee publications must be recognized.[4]

In addition, the court in *Szuch* v. *Lewis* (D.C. D.C., 1960) 193 F. Supp. 831, 833, held the "fund [was] set up for the benefit of a specific group of beneficiaries—*not all of whom will benefit*", thus recognizing that Section 302(c)(5) did not require the vesting of benefits. (Emphasis supplied.)

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[4] Each of the appellants was admittedly aware of the fact that his last employment before retirement was for a nonsignatory operator. (J.A. 18, 20 and 22).

Trustees urge this Court to correct the misconception, which may be drawn from its Opinion, that an employer's contribution on behalf of his employees creates any vested right in that employee to Fund pension benefits, since such vesting is not required by Section 302(c)(5), and is specifically rejected by the creating Trust Indenture.

ARGUMENT II

The Court's Opinion Requires Application of the Subjective Facts of Each Pension Applicant To Be Superimposed on Trustees' Eligibility Requirement, an Interpretation Not Warranted by Reason or the Applicable Law, Nor Determinative of the Arbitrary or Capricious Character of the Requirement.

Trustees' pension eligibility requirement of retirement following employment by a signatory-contributing operator is the only eligibility requirement touching on Section 302(c)(5)'s mandate that such trusts be created solely for the benefit of employees of contributing employers. This is the minimal possible application of Section 302 (c)(5).

An applicant's claimed employment for a signatory-contributory operator could run the full spectrum from no claimed contributory employment, to this Court's example of nineteen years contributory service and a final one year of noncontributory service before retirement. Though recognizing (Op. 7) eligibility requirements "are colored * * * by an element of arbitrariness", and "it is the responsibility of the parties and Congress to determine the appropriateness" of this pension eligibility requirement, the Court held that absent a factual basis for such requirement it was *prima facie* unreasonable.[5]

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[5] Inherent in the Court's opinion is the erroneous concept that the applicants have a *vested* right to pension benefits, premised on some portion of their employment history by a contributory operator. Without this assumption, not required or contemplated by the statute or the Trust Indenture, the Court's reasoning must fail.

This Court rejected as "rather hollow" the Trustees' explanation that the regulation was the minimal requirement necessary to comply with the contributory service requirements of Section 302(c)(5). Had the Trustees required the first, tenth or fifteenth year of industry service to have been for a signatory, would it have been any less "colored" than their requirement of retirement following regular employment? Any example can result in seeming inequities to the applicant who is just a little bit ineligible. See: *Addison* v. *Holly Hill Fruit Products* (1944) 88 L. ed. 1488, 322 U.S. 607, (Appellees' Brief, pp. 16-17) and *St. Lo Construction Co.* v. *Koenigsberger* (C.A. D.C., 1949) 84 U.S. App. D.C. 319, 174 F. 2d 25, cert. den. 338 U.S. 821.

This rejection ignores the fact that in Section 302(c)(5) the words "employees of such employer" are used in the *present tense*, and the court's specific interpretation of that Section in *Blassie* v. *Kroger Company* (C.A. 8, 1965) 345 F. 2d 58, "to mean covered current employees and persons who were covered current employees but are now retired." *Blassie* reaches a conclusion contrary to this Court, not only as to the meaning of "current" employment, but also that retirees remain "current" employees. (Appellees' Br. 17-18, 22.)

Literally, to make full compliance with the language of the statute, a regulation might state that the pensioner must have worked for a signatory from 1950 (or from a later date) to the date of his retirement. Instead, a regulation might fix an arbitrary fraction of the time from 1950 (or from a later date) to the date of retirement. But, what fraction could be selected that would not, in itself, provide an arbitrary line? If a time factor is to be used, the one that is under attack is the most direct one. It is the event nearest to retirement. It is minimal in duration.

The factors on which the Court seeks evidence on remand are plainly *subjective*, whereas an effective regula-

tion should be *impersonal and objective.* Or, stated differently but to the same effect, the Court endeavors to find out if the regulation in question is arbitrary in the light of the factors relating solely to these appellants. The Court is not viewing a regulation which is arbitrary *per se,* but is seeking to determine whether the regulation is arbitrary when applied to one individual as contrasted with another. If Trustees' pension eligibility regulations required the applicant to be of a particular "race or religion" it would be *per se* a violation of Section 302(c)(5). However, the requirement questioned by the Court, being premised on Trustees' discretionary application of the letter of the statute, is not a *per se* violation.

The majority opinion suggests five lines of evidentiary inquiry on remand.[6] Chief Judge Bazelon even supplies answers in his concurring opinion which would be favorable to the Trustees.[7] These suggestions of Chief Judge Bazelon, positive in nature, dovetail with the suggested abstract inquiries outlined by the majority opinion. Chief Judge Bazelon, following his positive approach, went on to say that if the applicant were forced off contributing

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[6] (1) Why did the applicant leave his signatory-employment?

(2) Were there wage differentials between his signatory-employment and his nonsignatory-employment?

(3) Was signatory-employment available to the applicant?

(4) What factors confronted the Trustees and the applicants "during the crucial period of these cases"?

(5) Finally, the majority opinion invites the submission by the Trustees of actuarial considerations.

[7] (1) If the applicant was discharged for cause; or

(2) if he voluntarily left service with a contributing employer to get some superior temporary wage benefit from a noncontributing employer; or

(3) if the applicant could have found other work with contributing employers after he left his "original" (meaning signatory) employment,

then the Trustees would not be acting arbitrarily in applying the test which is under attack.

payrolls because his employer closed his mine and because no other job with a contributing employer was available, then applying the standard of the regulation might be arbitrary and capricious.

Thus, it will be seen that the regulation, as it now stands, might be viewed as all right in relation to the facts concerning one applicant and all wrong concerning the facts as applied to another. *Ad hoc* decisions would have to be made by the Trustees, which would permit them to apply their regulation in one case and prevent them from applying it in another. What will happen in the case where the regulation, effective for one applicant, is ineffective for another? Are the Trustees thus to be placed in the posture of being charged with *discrimination* between applicants, when, applying the subjective test, the facts of two cases, which are similar but not identical, require a different determination?

The administrative chaos which will result if Trustees are required to apply the Court's subjective, factual differences as to each applicant, is readily seen. Whether or not the information is to be required on the application, the Trustees will be forced to closely investigate each applicant, to determine the personal variances attendant in each applicant's life. The employment picture is a prime example. The availability of contributory employment in the applicant's area varies from case to case. Then also, what considerations are to be given to determining just what area is to be applied to each applicant, within one, ten or twenty miles from his home, the same county, the same coal field, the same state, or the entire industry? Then after an extensive investigation, each time the requirement was relaxed on equitable grounds, a new re-

duced standard of eligibility would result until finally the pension awards would be based upon purely subjective exceptions rather than objective requirements.

In addition, it cannot be denied, the attendant administrative expense involved in delving into the myriad of personal problems of the thousands of Fund pension applicants will be substantial. Under the basic pension regulations adopted by the Trustees the proof of eligibility in the vast majority of cases is simple and inexpensive to obtain, from the viewpoint of both the Fund and the applicant. Social Security records from 1937 to date provide an instant and accurate source of proof, not only of the required twenty years industry employment, but also of the period of last regular industry employment for a contributory employer. A birth certificate, or satisfactory substitute evidence, provides the proof of age.

Acting under the mandates and limitations of the statute and the Trust Indenture itself, the Trustees have promulgated pension eligibility requirements in light of their knowledge of the complexities surrounding employment in the coal industry, always conscious however of the impact of these limitations on the discharge of their fiduciary responsibilities. To be workable, rules and regulations governing eligibility must be as specific as possible and set objective standards to be uniformly interpreted and applied. At times some circumstance beyond a beneficiary's control may intervene or some act on his part may occur, either of which may cause him to fall short of meeting the reasonable requirements of the regulation. Such circumstance, or event, in and of itself should not cause ac-

cumulated years of service to flower into "accrued" or "vested" rights, brand Trustees' action in promulgating the requirement as arbitrary or capricious, or render invalid *per se* a requirement both valid and reasonable.

The exercise of the Trustees' discretion, as reflected in the instant regulation, in the total absence of a scheme to discriminate, and based upon an ascertainable test, should not be disturbed.

Respectfully submitted,

WELLY K. HOPKINS
HAROLD H. BACON
JOSEPH T. MCFADDEN
907 Fifteenth Street, N. W.
Washington, D. C. 20005
Attorneys for Appellees

Of Counsel:

JOHN J. WILSON
FRANK H. STRICKLER
815 Fifteenth Street, N. W.
Washington, D. C. 20005